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ARTHUR LENHOFF

The Law of Evidence

A Comparative Study Based Essentially on Austrian and New York Law

Every legal system includes rules of evidence; that is, rules for the investigation of the particular facts of litigation. These facts are past events, and their accurate reconstruction therefore is impossible. This explains why the rules of evidence have varied in time and space, for human minds are bound to differ about the means by which to arrive as closely as possible at the true facts. Moreover, a Continental legal system such as that of Austria, when compared particularly with a legal system of Anglo-American character, also exhibits differences in the classification of the law concerning evidence. As in other Continental countries, so in Austria, evidence is treated within the framework of both the substantive and the procedural law, whereas in jurisdictions based on Anglo-American legal principles, rules concerning the proof of facts form a special branch of their legal systems.

While comparative study in its specific character tends to concentrate upon the contrasts rather than the similarities which exist among the various methods for ascertaining facts in a civil procedure, it is advisable to note, at the outset, a few basic principles of civil procedure which the systems compared herein have in common.

One such salient feature of civil proceedings is their "adversary," or in French terms, their "*contradictoire*" character. A case commences upon a party's demand and not as an official inquiry; it is left to the initiative of the adverse party to contest the demand and to frame defenses. Consequently, this principle requires that no decision be rendered without each party "having been given the opportunity of his day in court."

Another important principle is that of party presentation (*Verhandlungsmaxime*). Since it is for the parties to initiate the proceedings, it is left to them to present the facts in support of their demands and defenses. It is this principle, as Professor Millar points out, to which "Anglo-American civil procedure naturally conforms." He adds that this prin-

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"The Law of Evidence in Civil and Common Law Systems" was a topic of discussion at the annual Meeting of the Association of American Law Schools, 1953. This article is in part based on the author's address delivered at the Round Table on Comparative Law.

ciple, which had already characterized the Roman legal system, "entered into the various systems arising from the fusion of Germanic and Roman elements and, subject to more or less *qualification*, is paramount in all civil judicatures of the present day."[1] That "qualification," especially conspicuous in the subject matter of this article, will be discussed below.

Concerning the divergencies, for example, of the New York law of evidence from the Austrian law, it is scarcely necessary to mention that fundamental differences in the development of their procedural institutions are reflected in a multitude of divergencies in their evidentiary concepts. The task of comparing them within the limits of a paper is not easy. On the one hand, not even an attempt can be made at completeness; the comparative picture must be painted with a broad brush. On the other hand, the organization of the material selected calls for explanation.

Thus, it seemed to be helpful to take as a basis for the treatment of various problems of evidence their relation to the progress of a case and, therefore, to discuss them one after the other according to their importance for the successive phases of a case. Accordingly, the three first sections are introductory, dealing with the trier of facts and the forms of presentation of facts to him. The next two sections (IV and V) are devoted to the questions of the duties of the parties to the action with respect to factual information and designation of evidence on the one hand, and the controlling function of the court with respect thereto on the other. The following three sections (VI–VIII) discuss first the role of the court in the determination of the specific proofs which are to be produced, then the question of the last stage in which parties can still present facts and proofs, finally the question whether extrajudicial proofs can be taken.

In sections IX and X, the problems of burden of proof and of presumptions are discussed. Must the court follow certain proof rules or is it free in the evaluation of evidence? Does the principle of free evaluation relieve the court from rigid rules concerning the admission of certain kinds of proof? Are there exceptions to the free-evalution-of-evidence principle, excluding oral evidence for certain classes of actions or fettering the free evaluation of evidence by binding the court to proof rules in the case of certain means of proof such as documents or the party oath? All these questions are examined in sections XI to XV. And finally, Section XVI presents that means of proof called examination of parties as such (not as witnesses!).

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[1] Millar in Engelmann-Millar, History of Continental Civil Procedure (hereinafter cited as History), (1927) 17 (emphasis added). Also, the translations of "*Verhandlungsmaxime*" and other foreign terms here used are Professor Millar's.

It is especially important to keep in mind that the function of the judge and of the parties is, as may already have been suspected, essentially different in the Austrian law (and many other Continental laws) from that assigned to them by the law of New York and other states in this country; the great Austrian reform of civil procedure of 1895, the work of the eminent Franz Klein, greatly widened the function of the judge. This difference explains why, in contrast to those laws, rules excluding evidence in the United States "chiefly constitute 'the law of evidence.' "[2]

After this short survey, we may turn to the particulars.

I

The first distinctive characteristic of all Continental laws of civil procedure is that the learned judge is the trier of facts; there is no jury in civil actions. *Ergo*, Continental law escapes the difficulties which arise from the superhuman task of drawing a sharp line sundering the province of the judge from that of the jury. There is, therefore, no need for the nice distinction between the burden of producing enough evidence to avoid a nonsuit or a directed verdict, and the risk of nonpersuasion of the fact. For the same reason, the trial court is spared the intricacies inherent in the so-called mixed questions, such as whether it is for the judge or for the jury to decide on a fact situation in which probable cause or a violation of the standard of due care is involved.

II

In his most recent admirable work dealing with *American Civil Procedure*, Professor Millar remarks: "It was the existence of the jury, also, that originated our distinctive system of evidence." He thus explains why the principle of orality prevails; for the testimony of witnesses has to be conveyed to the jurors viva voce at an open hearing.[3] The Roman-canonical procedure, which was of greatest significance for the so-called common law procedure as it developed in the Austrian and German states from the fourteenth century until the reforms of the second half of the nineteenth century, followed the opposite principle, that of examination of witnesses by the judge in the absence of the parties. Since a decision had to be based only on records[4] (*acta*), the basis for the judgment was the summarized record of the testimony, made by the judge.[5] This was in

[2] Thayer, Preliminary Treatise on Evidence (1898) 180.

[3] Millar, Civil Procedure of the Trial Court in Historical Perspective (hereinafter cited as Civil Procedure) (1952) 22.

[4] Rosenberg, Lehrbuch des deutschen Zivilprozessrechts (5th ed. 1951) 15, quotes *"Quod non est in actis, non est in mundo."*

[5] Engelmann-Millar, History, 557.

accordance with the principle of documentation (*Schriftlichkeit*) pervading the whole procedure. The Austrian Code of Civil Procedure, inspired by the genius of Franz Klein,[6] is based on the idea that the whole proceeding before the trial court has to be controlled by the principle of orality. This principle extends far beyond the "orality" peculiar to our law, as for example in New York. Here, orality is restricted to the examination of witnesses whether nonparties or parties, the opening trial statements, some motions during trial, the closing summarizations by the attorneys, and the charge by the judge.

In Austria, the Constitution of 1867 had declared that the (whole) proceeding has to be oral.[7] This constitutional mandate was not fully carried out before Klein's Code, for the law of 1873 had introduced this principle for causes of smaller value only.[8] The new Code requires that the allegations as well as the interrogation of the parties, the recording of their motions, the proof order—all topics which will be presently discussed—and even as a rule the judgment, are subject to the requirement of orality.[9] Concerning allegations, it is well to remember that in New York, although testimonial evidence is as a rule[10] orally presented, the pleadings are always in written form. In contrast, the papers (*Schriftsätze*) by Austrian law have a merely preparatory function. The facts must be orally presented. Only the allegations made at the public hearing (*mündliche Verhandlung*) count. The principle of orality requires that the judgment must be founded on the orally presented allegations and proofs.[11] The Code even enjoins counsel from reading from the papers.[12]

In other words, by Austrian law the case must be made entirely at the public hearing. This is facilitated not only by the preliminary preparation of the judge, as we shall see, but also by a condensed record called "*résumé protocol*." The conception of such a record reflecting in condensed form all the essential occurrences during the hearing, that is, the parties' allegations made directly or in response to questions, the motions, the essential

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[6] More will be said about his great creation, *passim*.

[7] Fundamental law of December 21, 1867, R.G.Bl. 144, Art. X.

[8] Engelmann-Millar, History, 633.

[9] For the translation of this concept, "*Grundsatz der Mündlichkeit*," and the other terms later used in the text, full credit must be given Professor Millar. See History, 49.

[10] Extra-trial depositions may, upon certain conditions, be read, N.Y., C.P.A. §304, and the use of the testimony of a witness in a subsequent action is, under certain circumstances, admissible. N.Y., C.P.A. §348. In addition, the report of a referee appointed for the determination of facts presents an exception.

[11] Engelmann-Millar, History, 606.

[12] *Austria:* ZPO, §177 (1). The courts in the post-Kleinian era have often forgotten this prohibition.

parts of the testimony of witnesses and of the depositions of experts and parties, should be given a prominent place among the innovations of the Austrian Code.[13] The judge viva voce dictates the *résumé protocol*, summarizing all the relevant steps taken at the hearing, to a legal novice who acts as secretary. In so doing, the judge works under the control and with the co-operation of counsel on each side. The special importance attached to this measure lies in the effect which it has in clearing the way for the judgment; for this summation necessarily clarifies in the judge's mind those bases for the judgment which are present as well as those which are still lacking.

The contrast between this "protocol" and our "record" of a trial is obvious. It is not only the fact that the record consists of reams of stenographic notes, infinitely longer than a *résumé protocol*, rendering an immediate analytical survey simply impossible; but also that the contents of our records necessarily bring about such an effect; the stenographer takes down every word regardless of its relevance. Also, the time and costs involved in the so-called making of a case are saved to a party to an Austrian procedure.[14] An Austrian appellate court receives a file of which the *résumé protocol* constitutes an essential part; thus, the court is splendidly and succinctly informed about the allegations and evidence.[15] This is the result of the high evidentiary value of the protocol, which is granted, by the Austrian Code, the quality of being conclusive evidence as respects the contents and the course of the hearing.[16]

As early as 1667, when Colbert's *Ordonnance sur la procédure* was promulgated, which became the basis for the present *Code de procédure civile* of 1806, France had essentially modified the Roman-canonical procedure. The mode of French proceeding is characterized by the principle of orality in fact presentation and argument. In contrast to Austrian law, viva-voce evidence is given an inferior place in French (and also in Italian) law.

It provides for testimonial evidence with great limitations. Excepting summary and commercial-court proceedings, such proof is taken only before a judge delegated by the court, which, thereafter sitting on the case, sees only, as Professor Millar has so aptly stated, the written results of the examination.[17]

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[13] *Austria:* ZPO, §§211, 216, 343, 367, 370, 380, 451 (2).
[14] *New York:* Rules of Civil Practice, Rule 230.
[15] *Cf.* R.F. Weissenstein, in 8 Oesterreichische Juristen-Zeitung 346 (1953).
[16] *Austria:* ZPO, §215.
[17] Engelmann-Millar, History, 63.

III

In contrast, Klein's reform focused on the principle of immediacy (*Unmittelbarkeit*). This means that the judge or the judges who have to decide the case must also hear the evidence. Franz Klein was relentless in his rejection of a method whereby a court would rest its decision upon a report on evidence taken by a "delegated or requested" single judge (*beauftragter* or *ersuchter Richter*). It is true that his code includes a so-called "preparatory proceeding" before such a judge. However, this incidental proceeding is available only in three specific situations. These are: *first*, actions in which the facts alleged are so multifarious or complicated as to require clarification (similar to our recent pretrial conferences); *second*, actions for accounting or for partition of assets or similar types of actions involving a great number of disputed claims; and, *third*, proceedings requiring the taking of such evidence as would defy reception before a trial court because of impossibility or difficulty or inevitable delay which such a reception would entail. It is entirely left to the discretion of the court to direct a preparatory proceeding. But, from the start, the courts were admonished by Klein to refrain from utilizing rather than to use such discretion.[18] No wonder that this proceeding long since fell into disuse.

It may be instructive to compare this trait of strict adherence to the principle of immediacy, for which the Austrian Code of 1895 is conspicuous, with those Continental laws which have, as one of the main features of their procedural systems, the division of the judicial functions in a civil action between a single judge who has to "prepare" and the chamber of judges who have to decide the case.[19]

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[18] Franz Klein, Vorlesungen über die Praxis des Zivilprozesses (1898) 99. *Cf. Austria:* ZPO, §245 ff.

[19] The German law departs from the principle of immediacy to some extent. The 1927 Amendment to the German Code on Civil Procedure, like the French and Italian law, divided the proceeding before the High Court (*Landgericht*) between a single judge who prepared and a full bench (Chamber) which decided the case. In practice, all witnesses were heard before the single judge. The result was that the court sitting in full bench was presented with a record, but did not see or hear the witnesses. Ernst J. Cohn, "New Regulations in the German Code of Civil Procedure," 17 Jl. Comp. Leg. & Int'l. Law (1935) 73. The 1933 Amendment attempted to remedy this by directing the single judge to take proof only where it is desirable from the standpoint of shortening the oral hearing before the Chamber, provided that the full bench can be expected accurately to appreciate the evidence without having a direct impression. *Germany:* ZPO (as amended 1933, July 20) §349 II 2. However, the German law follows the principle of immediacy in the case of a stipulation by the parties to the effect that the single judge himself is to render the final judgment. In large cities, parties have very frequently made use of this possibility, which the law limits to cases concerning pecuniary claims.

In France and Italy, the principle of immediacy has found even less acceptance. Neither

Even Franz Klein was compelled to make allowance for one unavoidable exception to the principle of immediacy. This is the abovementioned case of impossibility or difficulty in reception of oral evidence by the trial court. The Austrian law authorizes the trial court under such circumstances to direct interrogation of a witness before a member of the chamber (delegated judge) if the evidence can be taken within its jurisdiction, otherwise before a judge of the court of the locally competent jurisdiction (requested judge). Such a measure is particularly necessary in the case of an examination of a nonresident witness.[20] Naturally, in this respect, New York law is not essentially different from Austrian law.[21]

IV

There is a basic difference between New York law and Austrian law in the methods to be followed by the parties in specifying the evidence which they offer in support of their allegations. The New York rules of pleading, following the English Rules of the Supreme Court (1875) (Order 19, Rule 4), exclude any reference to evidence in the pleadings. By contrast, the Austrian law insists on specific designation in the pleadings and oral presentations of the several media of the proof on which the parties intend to rely. The evidence which is to be used is, therefore, disclosed in advance. This is in direct contrast to our trial tactics, in which the surprise element has been retained despite the changes in pretrial procedure involved in our most recent federal and state trends in the law.[22] In contrast, not only by Austrian law, but also by Italian and French law, the parties have to specify the evidence together with the allegations and counterallegations, which means that every allegation has to contain a reference to the corresponding media of proof offered as evidence.[23] Thus,

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have the recent French amendments of 1935 and 1944 nor the new Italian Code on Civil Procedure of 1940 shown a noticeable shift towards this principle. French law still provides only for extra-trial examination of witnesses, the *enquête*. The amendments have merely changed the law in this respect by giving the single judge charged with the preparatory part of the proceeding (he is called *juge chargé de suivre la procédure*) the power to order and to take the *enquête* himself. See Code de Procedure Civile (C. proc. civ.) (1806) as amended by Acts of October 30, 1935, and July 15, 1944, Art. 80 ff. The present Italian Law shows a similar structure. See Codice di Procedura Civile (C. proc. civ.) (1940) Arts. 187, 202 ff.

[20] Compare *Austria:* ZPO §§279, 286, 287.

[21] *N.Y.:* C.P.A. §§288, 304.

[22] This procedure aims primarily at simplification of the issues and at disclosure of documentary evidence, e.g., in an antitrust suit. It is left to the parties' discretion to present other evidence. See also Millar in 17 Rivista di diritto processuale civile (1940) 41, 46.

[23] *Germany:* ZPO, §130 no. 5, §253 IV; Italian C. proc. civ., Arts. 163, 167. The French C. proc. civ., Arts. 252, 303, etc. requires special "*conclusions*" varying with the various media, such as witnesses or experts or interrogations of parties.

the Italian Code prescribes that the complaint must contain, *inter alia*, a statement of the media of proof (*mezzi di prova*), such as the names of witnesses on which plaintiff intends to rely, and a list of the documents which the plaintiff offers in evidence.[24] If in France a party offers to prove certain facts by witnesses, the facts exactly itemized[25] must be communicated to the adverse party with the request to admit them. If there is a denial or an answer which is not satisfactory or no answer at all, the *juge chargé de suivre la procédure* or the court may order an *enquête;* that is, the taking of testimony on those facts which are itemized in the incidental judgment (*interlocutoire*).[26]

The discussion below will show the intimate connection of the subject with the important principles to which we now turn.

V

When Franz Klein undertook the great procedural reform in Austria, he did by no means change the idea of a civil action as a fundamentally contentious procedure, based upon the principle of party presentation. However, as Dean Roscoe Pound eleven years after the creation of the Austrian Code of Civil Procedure in his famous address on the "Causes of Popular Dissatisfaction with the Administration of Justice" showed, civil procedure need neither "of necessity be wholly contentious" nor require of a judge that "he has only to decide the contest as counsel present it" and must not "search independently for truth and justice."[27] The last remark expressed the criticism which Dean Pound directed at the exaggeration (in our procedure) of the idea that the parties shall have control over the cause and its progression.[28]

Franz Klein did not by any means entirely suppress the idea called, in the Austrian and German terminology, the principle of party prosecution (*Parteibetrieb*), as distinguished from that of judicial prosecution (*Amtsbetrieb*) which assigns to the court the function to supervise, *ex mero motu*, the development and progression of the cause. The German Code of 1877 presented, as Professor Rosenberg states, a system reflecting both prin-

[24] *Italy:* C. proc. civ., Art. 163 (no. 5). Sereni, "Basic Features of Civil Procedure in Italy," 1 Am. J. of Comp. L. (1952), 372, 378. Furthermore, C. proc. civ., Art. 244 requires that the order directing proof by testimony of witnesses has to designate the person and to specify in separate counts the facts to be proved through the interrogation of the person.

[25] *France:* C. proc. civ., Art. 252 ("*Faits . . . articulés succinctement*").

[26] *Id.*, Art. 252, 81. A.C. Wright, "French and English Civil Procedure: A Parallel," 42 L. Q. Rev. (1926) 326, 341, 342; Morel, Traité Élémentaire de Procédure Civile, (2d ed. 1949) no. 489.

[27] Address delivered at the Meeting of the A.B.A., August 29, 1906 (included in Vanderbilt, Cases and Materials on Modern Procedure and Judicial Administration (1952) 32, 39).

[28] See also Millar in Engelmann-Millar, History, 25.

ciples.[29] Klein's reform granted the judge a wider province of activity, particularly by investing him with a measure of directive power in the conduct of proceedings (*Prozessleitung*) which is not only formal, but also substantial with a view to having the material in the cause clarified and as fully developed as possible.[30]

A second idea, hardly less striking than the first with which it is logically connected, loomed large in Klein's reform. Klein's Code placed upon the parties the "*obligation to speak the truth.*" If the judge is relegated to a merely negative or formal role during the proceeding, or if the orality of the proceeding is reduced to a minimum (as it was in the former Austrian proceeding), there is no limit to the lies of the parties.[31]

The Austrian Code of 1895 in §178, imposed upon the parties "a duty to present truthfully, unequivocally, and completely all material facts which are related to their contentions."[32] This duty was later included in many European codes.[33] Self-interest along with the contrariety of the interests of the parties tends certainly, as Professor Rosenberg puts it, in the direction of completeness and clarification of the cause-material.[34] This is one of the benefits inherent in the principle of party presentation; but the duty of a truthful presentation strengthens the tendency considerably, particularly where compliance is under the active control of the court.

In the Austrian Code, the court is directed to ensure that *all* relevant facts are stated, incomplete allegations rendered complete, and all means of proof for such statements and allegations designated beforehand.[35]

In this light, various interesting provisions of the Austrian Code should

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[29] Rosenberg, *op. cit.* (note 4, *supra*) 269.

[30] See James Goldschmidt, Zivilprozessrecht (1929) 18, for the wide adoption of these ideas in the amendments to the German Code from 1909 on.

[31] "*Acta non erubescunt*" ("records cannot blush") became a byword.

[32] Rosenberg, *op. cit.* 267. The German amendment of 1933 formulated ZPO, §1381 "by following that Austrian provision." Incidentally, this provision, like the bulk of the Amendment of 1933, had been completely drafted in the pre-Nazi era. See Professor Cohn, *loc. cit.* (note 19, *supra*) 73–75.

[33] *Hungary:* Code of Civil Procedure (1911) §222 II. The new Italian Codice di Procedura Civile 1940 (as amended by Act 1950, July 14) does not include an express obligation to state truly the facts, but see Arts. 88 and 117. See also the Codes of Kanton Zürich (1913) §90, and Kanton Bern (1918), Art. 42. See the articles by Redenti, Rivista di diritto Processuale (1941) I 25, 30, and by Carnelutti, *id.*, 35. Yet see 2 D'Onofrio, Commento al Cod. Proc. Civ. (2d ed. 1951) 132, who deduces a duty to state the facts truly from Arts. 96, 117. For the consequences in the German law of procedure which may result from a wilful failure to comply with the duty, see Rosenberg, *op. cit.* 269.

[34] Rosenberg, *op. cit.* 271.

[35] *Austria:* ZPO, §182; see also *Germany:* ZPO, §139 and *Switzerland:* Federal Code on Civil Procedure (Act, 1947), Dec. 4, A.S. 1948, 485).

be regarded. Thus, the court is empowered to direct the parties to attend the hearing in person.[36] The court seeks full information; hence, the Code authorizes the court to subject the parties to an "informal examination" on the facts.[37] By Austrian law, the court is not confined in this examination within the limits set by the allegations of the parties. The court is required to extend the examination so that *all* relevant facts on which claims and defenses repose should become known.[38]

All this is "fact-discovery," to use Professor Millar's expression.[39] The recent French statute of 1942 has abolished the formal interrogatory. However, the French judge may order the parties to give further information and to clarify their allegations. The French law provides also for a free examination of the parties before the full bench in open hearing (*comparution personnelle*).[40] It is noteworthy that the court can take this proof measure even on its own motion. It is true that the informal examination provided for by the Austrian practice is only a part of the formative stage of collecting factual material (*Stoffsammlung*),[41] whereas the French oral examination of the parties constitutes evidence. However, this difference loses importance for all practical purposes. This becomes clear with the recognition that, in accordance with the principle of free evaluation of evidence, the Austrian law requires that the results even of a merely informal examination be carefully weighed. This principle will be discussed later. The significance of the failure of a party to appear in person although he was so ordered, or his refusal to answer a question, are equally subject to that free evaluation.[42]

The preponderant role of the court appears in full light at the taking

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[36] *Austria:* ZPO, §183; *Germany:* ZPO, §§141 I, 272 b II 3; *Italy:* C. proc. civ., Art. 117; *Hungary:* ZPO §226; *Norway:* ZPO, §114. The German law provides for the enforcement of such a direction by means of fines (but excluding arrest).

[37] *Austria:* ZPO, §182; *Italy:* C. proc. civ., Art. 117; *Germany:* ZPO §§141 I, 619 I; *France:* C. proc. civ. (as amended by Act 1942, May 23) Art. 324. For the Danish and Norwegian law, following in this and many other features the Austrian model, see Munch-Petersen, "Influence of Austrian Act on Civil Procedure on the Scandinavian Laws" in Festschrift for Franz Klein (1914) 251, 257.

[38] Rosenberg, *op. cit.* 274 interprets the German provision to mean that the task of the court is limited to having the parties remove inconsistencies or gaps in their allegations and clear up obscure statements.

[39] Millar, "The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure," (hereafter cited as *Fact-Discovery*) 32 Ill. L. Rev. (1938) 261, 262.

[40] See footnote 31, *supra*. For the right of the judge to ask for further information, etc., see Morel, *op. cit.* 345.

[41] See Rosenberg, *op. cit.* 274, for the German law.

[42] *Austria:* ZPO, §272 II; *Italy:* C. proc. civ., Art. 232 (and compare Art. 229); Redenti, 1 Diritto Processuale Civile (1952) 46; C. proc. civ., Art. 336 (as amended 1942) and also Morel, *op. cit.* 410.

of evidence. The court conducts the examination whether of witnesses, experts, or parties. After the interrogation by the judge, counsel of the parties may ask further questions. Only the Swedish law allows the court to authorize a primary interrogation by counsel in an individual case.[43] All this is, of course, different from our trial procedure. Naturally, the job of conducting the entire hearing presupposes thorough preparation on the part of the presiding judge. The Austrian judge is supposed to come to the hearing well informed, to have studied the complete file, and to have analysed the legal questions involved in the case. The pleadings have not the preclusive purpose of fixing the issues. They inform the opponent as well as the court about the fact situation without excluding new allegations and a designation of new proofs, which may be made during the public hearing.

VI

Closely related to the fundamental ideas just discussed is the principle of judicial determination of the evidence to be taken. By French law, the court renders incidental judgments to this effect.[44] Since the Amendment of 1944 the *juge chargé de suivre la procédure*[45] can in the preparatory part of the proceeding, exactly as the single judge in the Italian preparatory proceeding, order the taking of evidence.[46] In the Austrian Code, provision is made for a so-called proof order.

Before considering such an order, let us cast a comparative glance at the subject. The New York law leaves it, in general, to counsel to present evidence on every matter in dispute, provided its "admissibility" is not successfully challenged by his opponent. Thus, the parties themselves determine the themes which are to be proved as well as the evidence to be submitted in support thereof.

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[43] Fischler, "The New Swedish Law of Procedure," 2 Monatsschrift für Deutsches Recht (1948) 276. This would come near to our cross-examination, and should be distinguished from the permission given by the judge *after* his interrogation of the witness has been completed, to counsel to ask questions of the witness. *Austria:* ZPO, §289 (I); *Germany:* ZPO, §397 II.

[44] After an incidental proceeding, C. proc. civ., Art. 255 (testimony); Art. 325 (examination of parties); Art. 296 (inspection of a locality); Art. 302 (experts). A specially appointed judge receives the evidence stated in such a "judgment." Engelmann-Millar, History, 758. According to the new Italian Code, proof orders are to be made by the single judge during the probative stage of the preparatory proceedings, C. proc. civ., Art. 188; 2 Redenti, *op. cit.* 79, 80. There are a very few exceptions, one of which concerns the taking of the "supplementary oath" by a party (C. proc. civ., Art. 240), and the other—it is very rarely used—the adduction of evidence before the full chamber; *id.*, Art. 281. Naturally, the orders of the single judge as to the admissibility of evidence are subject to the final examination by the chamber. C. proc. civ. (as am. 1950), Art. 178.

[45] This is his official name. C. proc. civ., Art. 80 (1).

[46] C. proc. civ., Art. 81 (1) (2).

The contrast with the Austrian procedure is remarkable. True, also by the Austrian law and with due consideration given to the duty of the parties to state the truth and to the right and the duty of the judge to elicit by informal (or formal) interrogation more clarification and supplementation of the factual material, the parties' task is to submit this material to the court. Thus, the parties must decide which facts are to be considered by the court and, therefore, required to be proved. (Principle of party disposition, *Dispositionsprinzip*).[47] The operation of this principle is, of course, qualified by the obligation to speak the truth and by the judge's directive power.

However, in the first place one has to distinguish between the offer of evidence (*Beweisanbietung*) and the taking of evidence (*Beweisaufnahme*). The former is left to the parties, the latter is in the hands of the court.[48] A party's offer of evidence must contain a statement of the specific facts ("themes of proof") on which the taking of evidence is desired and a designation, theme for theme, of the specific means of proof which the party has selected and proposes, such as witness "A," expert evidence, judicial inspection, and so forth.[49] But, as indicated later, it may happen that the court may gather evidence which is not offered. For the moment, it is important to bear in mind that no proof can be taken without an order of the court and that the court, not the parties, formulates specifically the points of fact ("themes") which are to be proved. The judge alone determines which media of proof among those offered by the parties he wants to use. For instance, the proof order of the judge will tell the parties whether witness "A" or witness "H" or evidence by experts will be heard. Thus, the court designates specifically, theme for theme, the particular kind of evidence which will be considered for each theme.

One may observe that, by this token, the Austrian Code in defining the component parts of such a judicial proof order has considered any reference to the party who designated the specific means of proof admitted in the order, as entirely irrelevant.[50] Assuming for instance that testimony of witness "A" be included in the proof order, it does not appear in the order whether the plaintiff or the defendant had nominated him as witness.

At the same time, it is evident from the procedural law of Austria and many other Continental states that the courts to a greater or minor degree may, for the purpose of ascertaining factual allegations of the

[47] 1 Pollak, System des oesterreichischen Zivilprozessrechts (2d ed., 1930) 476, 480.
[48] *Id.* 485.
[49] *Id.* 486.
[50] The German ZPO, §359, calls for such a designation.

parties, resort to certain means of proof on their own motion, viz., without a specific proposal by the parties as to such means of proof. By Austrian and Norwegian law, any kind of evidence may be resorted to by the court, with the exception of private documents and the examination of witnesses, when objected to by one of the parties.[51]

A comparable approach characterizes German law. The German judge is not barred from resorting to certain media of evidence. Professor Rosenberg points out that the judge has the power and the duty, in the absence of offer by a party, to direct the taking of evidence by judicial inspection, by the hearing of experts,[52] and, where the previous evidence did not satisfy him of the existence or nonexistence of an alleged fact, even by examination of one or both parties.[53] All this is in addition to his power *ex mero motu* to direct the parties to bring before the court documents to which they had referred in the pleadings.[54] However, a document *ex officio* procured from a party can only be used or a witness summoned *ex officio* to the trial can only be examined during the oral hearing, if a party had referred to the document or offered the testimony.[55]

Subject to a few qualifications, the Italian judge has the power to order the production of documents even from non-parties ("a third person") and can use the documents, thus produced *ex officio*, as evidence.[56] A

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[51] Austrian ZPO, §183. (The exception does not extend to commercial books; Austrian Commercial Code, §45.) The reason for the exclusion from the scope of the directive power of the court of the calling of witness must be sought in the intent to avoid publicity as respects persons whose privacy all parties want to protect. See Engelmann-Millar, *op. cit.* 636. For Norwegian law, see Munch-Petersen, *loc. cit.* 256. By Danish law, parties must not be examined *ex officio*, where the parties do not agree to the taking of this proof. Munch-Petersen in 1 Rabel's Zeitschrift (1927) 225.

[52] Austrian, German, French, Italian, and many other Continental laws distinguish "experts" from "witnesses." Experts are appointed by the court, with or without regard to suggestions made by the parties. For this reason, the court is entitled to rely on the evidence of a single expert. Cohn and Meyer in 2 Manual of German Law (1952) 62. An "expert witness," to be distinguished (German) ZPO, §414; Austrian ZPO, §350) from an expert (German ZPO, §402–414; Austrian ZPO, §§351–367), is a witness, since his deposition refers to past facts which were observed by him, even if only his special knowledge or professional instruction enabled him to make such observations. 2 Pollak, *op. cit.* 661.

[53] Rosenberg, *op. cit.* 274. *Cf.* German ZPO, §144, 272b II 5, 452.

[54] *Germany:* ZPO, §142 I. In preparation for the oral hearing, the judge may call for the production of documents, even if there was no reference to them in the pleadings. *Id.* §272b II, no. 1. Equally, he may call upon public authorities or officers for the communication of documents and official information. *Id.* §272b II, no. 2. For other examples of taking evidence see Stein-Jonas-Schönke, Kommentar zur ZPO (18th ed. 1952) §128 IIIa and §282 I.

[55] Rosenberg, *op. cit.* 275, 541.

[56] C. proc. civ., Art. 210. For qualifications, see Art. 118. As for "third-persons" documents, Art. 211 provides some safeguards for the protection of the rights of such persons. *Cf.* 2 Redenti *op. cit.* 208/9.

French judge may, subject to certain limitations, *ex mero motu* order an *enquête* (testimony), examination of the parties, evidence by experts, inspection of localities or other subjects, and may also, *ex officio*, tender a suppletory oath to a party.[57]

Again, for the sake of comparison with the Anglo-American law, we find that in the last few decades English high courts have denied that a judge, at least in a civil case, has the power to call a "witness" *ex mero motu*.[58] The few American (non-New York) cases in which such a power was granted concerned causes other than civil actions proper. Most of them were criminal cases. Finally, in all such cases, the witness who was not called by the parties was an expert witness.[59] The difficulty with the exercise of such a judicial power lies in the peculiar structure of the Anglo-American trial, conspicuous for its absolute reliance upon direct examination by one party and cross-examination by his opponent, a form of hearing evidence which could only by Procrustean methods be applied to witnesses who are not brought in by either party.[60] Despite the protests of outstanding scholars,[61] "the instincts of sportsmanship," to use Wigmore's expression, still control the Anglo-American concept of trial.[62] Even the holders of the view that an Anglo-American judge has the power to call evidence, deny that he is under a duty to adduce it.[63] They properly set off by contrast the fact that the judge in many important European

[57] *France:* C. proc. civ., Arts. 254, 324, 322, 295, and Code civil, Arts. 1366, 1367. Morel, *op. cit.* 345, 379.

[58] Rex. v. Harris [1927] 2 K.B. 587; *In re* Enoch and Zaretzky, Bock & Co. [1910] 1 K.B. 32. (Said the court: "A civil case is a dispute between the parties and the judge keeps the ring.") But see Coulson v. Disborough [1894] 2 K.B. 316. For criticism, see Lord Chorley, "More Thoughts on the Problem of Trials," 25 N.Y.U.L. Rev. (1950) 512, 517, 530 ff.

[59] Federal Rules of Criminal Procedure (1946), Rule 28; Messner v. State, 202 Wisc. 284, 131 N.W. 634 (1930); Hunt v. State, 248 Ala. 217, 27 So. 2d 186 (1946); Selph v. State, 22 Fla. 537 (1886). In isolated cases, an expert has been called by the judge also in ordinary civil cases. See, e.g., Kamahalo v. Coelho, 24 Hav. 689 (1919, Hawaii). Experts have been called in proceedings before the Tax Court. See James H. Persons, 5 B.T.A. (1926) 716. And this goes without saying in the case of an administrative tribunal. An express authority to call any witness has been granted to a court-martial in Appendix 8 to Procedure for Trials before General and Special Court-Martial. Manual for Court-Martial (1951) 517.

[60] In the Kamahalo case, cited in the preceding note, the judge permitted his expert to be cross-examined by both parties.

[61] Justice Felix Frankfurter diss. in Johnson v. U.S., 333 U.S. 46, 53, 54 (1948) (criticizing trial judge's failure not to call a witness in a negligence case even though none of the parties called him); see also 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, (3d ed. 1940) 266. See also R. Pound, C., in Ulrich v. McConaughey, 63 Neb. 10, 88 N.W. 150 (1901) and in his Address 1906, *loc. cit.* (note 27, *supra*) 40. 5 Jones, Commentaries on the Law of Evidence, (1914) 87, uses a more guarded language ("It has even been held that a judge may call a witness.")

[62] 6 Wigmore, *op. cit.* 374.

[63] 9 Wigmore, *op. cit.* 266.

countries, as we saw, not only controls the presentation of evidence, but has also the duty to make sure by questioning the parties and by his preparation that all possible means of proof are designated and available.[64]

What thoughts will guide a court in Austria in rendering a proof order? The role of such an order is to obtain proof about disputed facts, the existence or nonexistence of which has in the view of the court a bearing upon the decision of the case. In its every aspect, such an order is the result of judicial examination of the whole material, from the legal standpoint, embracing documents and oral presentations.

Having studied the whole file and having heard the oral arguments at the open hearing, he is able to fashion the themes in accordance with the facts to be proved in the image impressed on his mind, formed by legal experience and positive knowledge of the law. The result is a well-considered order which points out a few particularized themes stated in terms of distinct facts and describes specifically the evidence which shall be heard on each theme. Moreover, one must not overlook that the orders directing the hearing of evidence are rendered by the court in the exercise of its directive power. Accordingly, the court may render such an order whenever it thinks it desirable. Thus, it may issue several orders in the same proceeding. It is obvious that at times a court might feel impelled to hear new evidence which had not appeared at the time of the pronouncement of the order. The order might have included only one theme but thereafter a party might have alleged new facts, during or after the time when the evidence on that theme was heard; or a new factual angle or version implying a new legal view of the whole picture might have suggested itself during the hearing of that evidence, for example, in the deposition of a witness. Situations like these may prompt the court to the issuance of another order letting in new evidence. This evidence may have previously been offered by the parties, but the court have thought it unnecessary to include it in the proof order. Now, the court may, without a new motion, order the taking of such evidence. Naturally, if the new evidence has not previously been proposed, it cannot be introduced into the cause without an offer of a party, the cases mentioned previously regarding introduction *ex mero motu* notwithstanding.

Conversely, the court might revoke a more extended order where the taking of further evidence which was included therein seems no longer necessary. The proof orders, as one sees, are an instance of the exercise of the "directive power" given the court in the modern codes. They are not appealable because they have not the slightest characteristic of finality.

[64] *Id.* vol. 5; §1866; vol. 9 §2483.

Their recall or change does not delay the hearing. The French law is different upon this point.[65]

Prior to the First World War, an adjournment of the oral hearing, necessitating at least one more hearing, very rarely occurred in an Austrian court still swayed by Klein's spirit.[66]

The average oral hearing lasts several hours; very rarely more than one day. In Italy or France, the oral hearing is even shorter because most of the evidence is taken during the preparatory stage.

VII

The mode of proceeding characterized by judicial domination is geared to the most speedy disposition of the case. Inherent in this trait, on the one hand, is the idea of concentration of the presentation and proof of facts in one single hearing. This is the great achievement of the Austrian code.

On the other hand, the idea of a preparatory stage preceding this open hearing—the recent innovation of the German, French, Italian, and Swedish laws referred to previously—does not correspond to the division of our proceedings into an allegation-proceeding and a proof-proceeding. It is consistent with this pattern that by the law of all the countries which have adopted the innovation, with the exception of Sweden, evidence may be adduced in the early, that is, the preparatory part of the proceedings. Naturally, the Austrian Code, for example, includes provisions which authorize the court on its own or on motion of a party to reject new allegations and proofs, presented at the last stage of the proceedings, if the court has reason to believe that the new matter is presented solely for the purpose of, and will actually result in, delaying the proceedings.[67]

[65] Prior to the amendments to the French C. proc. civ., enacted by the Acts of May 23, 1942, and July 14, 1944, it made a difference whether such an "incidental" proof judgment was "interlocutory" or only "preparatory;" for whereas the former was immediately appealable, the latter was not. The distinctive characteristic was that the interlocutory judgment in contrast to the preparatory one, determines the merits ("*préjuge le fond*"), Morel, *op. cit.* 433. The Act of 1942 did away with this distinction. It grants the right of appeal in any case. C. proc. civ., Art. 451. On the other hand, the Act of 1944 divested the interlocutory proof-judgment of any binding effect. C. proc. civ., Art. 81 (5); Morel, *op. cit.* 366, referring also to C. proc. civ., Art. 809.

[66] For the influence of his creation, the Austrian laws of 1895, on the subsequent procedural legislation in Hungary (1911), Norway (1915), Denmark (1916), Poland (1932), see Millar, "Civil Procedure Reform in Civil Law Countries," in David Dudley Field Centennial Essays (1949) 120 ff. The influence of many new great ideas of the Austrian Code can be seen also in the German reform, 1924 and 1933. Rosenberg, *op. cit.* 21; Martin Wolff in 2 Traité de Droit Comparé (ed. by Arminjon, Nolde, Wolff 1952) 232 ff., and in the Swedish Act on Procedure of 1942. For Franz Klein, see Sperl in 58 Jhering's Jahrbücher für die Dogmatik des bürgerlichen Rechts (1927) V–XXXVI.

[67] See, e.g., *Austria:* ZPO, §§179, 275, 278(2); *Germany:* ZPO, §279, see also §279a. (By

Where orality and immediacy prevail courts will in most cases, in order to avoid adjournments and new hearings, summon all witnesses locally available and may even include in the proof order evidence which will not be needed unless the appellate court should view the case from a different legal perspective.

But we may ask whether the one-oral-hearing concept, which made its entry in Continental legislation in 1895 in Austria, resembles the New York pattern of one trial. Aside from the cross-examination and all the other differences in the basic structure between a hearing there and a trial here, the arrangement or order of presentation is left in New York to the discretion of counsel. These have practically unhampered control over the order of all the topics within the case. Thus, counsel will proceed "as the dictates of intelligent tactics require."[68] The only test for relevancy is thus the apparent connection of the evidentiary fact with the case, not the question of how many or how few of those facts are the factual conditions for the application of a rule of law determinative of the decision of the whole case. All this accounts for the immense length of time which a single case may occasionally require.[69] Not until the very end of the trial is reached, has the New York judge fully analyzed the legal problem and thus approached the question which facts must be established to decide the legal issue in one way or another. Only at the very end of the trial, in his charge to the jury, if there is any, is he bound to point out which facts are essential for the answer to the question which rule of law has to be applied. Until then, his function consists only in the exclusion of such evidence as does not affect any issue of fact, or is unrelated to it. In brief, his function turns upon the admissibility of evidence and not upon adjustment of the quantity of admissible material presented, to the amount of evidence required.

VIII

Exactly as under the Austrian code no evidence is admitted without a judicial order or intermediate judgment, so no extrajudicial examination of witnesses or parties is possible from the standpoint of the basic principle that the taking of evidence in general, and the examination of witnesses and parties in particular, are eminently judicial functions. By contrast, in the common practice of New York courts, such examination takes

German law gross negligence of the party (or counsel) causing delay in the presentation is equivalent to intentional delay.) *Italy:* C. proc. civ., Arts. 184 and 208.

[68] 6 Wigmore, A Treatise on the Anglo-American System of Evidence (3d ed. 1940) 501, 504.

[69] *Id.* 493 (§1865) ("Almost total disregard for the value of time").

place without an order of the court and in the absence of any judicial officer. In other words, the usual pretrial examination in New York law can hardly be transplanted into Austria.

A pretrial or even a preprocedural examination by a judge of witnesses and experts (not of parties) in a few exactly defined situations, is obtainable under Austrian law.[70] However, in New York and a great many other American states, the law has caused discovery to become nearly a common phase in every contested case and in most of the many categories of business cases.[71]

IX

In New York, the burden of adducing evidence comes to the fore even at the beginning of the trial, for in order to avoid an adverse ruling, a party has to meet that burden in the great number of situations where no more than a prima facie case is made by his opponent, even more so where one of the many presumptions arises. In contrast to this, there is in none of the modern Continental proof orders or proof judgments any hint on "burden of proof." After the court has heard all declarations made by the parties, the examination of the whole material from the legal point of view will lead the court to conclusions which might or might not necessitate the taking of proof.

The logical connection between the duty placed upon the parties to speak the truth, supervised in its performance by the judge's directive power, and the decrease of the role of burden of proof is observable in the theory and practice of Austrian law. This is conclusively borne out in the authoritative treatise on the Austrian *Law of Civil Procedure* of the late Professor Pollak—an eminent judge and proceduralist:

"Compliance with that duty spares the (Austrian) courts the wealth of controversies characterizing German law in the matter of burden of proof. That duty spares the (Austrian) courts a classification of facts, as creative, inhibitive, and destructive of rights [*"rechtsbegründende, rechtshindernde und rechtszerstörende Tatsachen*]. That duty spares the courts a categorization of allegations according to their favorable or adverse effects. . . .The Austrian Code does not need such classifications and categorizations, and does not recognize them. Nor does it allot any burden of pleading or proof to either party. . . . Since without reservation *everything must be presented by the parties, everything presented becomes material for the adjudication.* Only in the case that

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[70] *Austria:* ZPO, §384; Cf. *Germany:* ZPO, §485; *Italy:* C. proc. civ., Art. 696.

[71] For statistics see Speck, "The Use of Discovery in the U.S. Courts," 60 Yale L.J. (1951) 1133, 1148.

gaps in the presentation of facts remain, controversies appear; this would present an exceptional case."[72] (author's emphasis).

In this light, it is apparent that under Austrian law, in the overwhelming majority of cases, it is irrelevant which of the parties had come forward with factual statements or who had designated the specific evidence.[73] This question is to be distinguished from the effects of absence of proof as to an essential fact. As will be presently shown, the judge's free evaluation of all that has occurred at the public hearing decides whether an essential factual element is proved; the applicable legal norm determines which party bears the risk of lack of such proof.[74]

The legal history of Austria as well as of New York demonstrates that the attitude of the courts towards a great legislative innovation may determine its destiny. It is a fact that the Austrian courts accorded the innovations just discussed a friendly reception. What was the reason?

The secret of Klein's great success was due not only to the unique qualities of his work, which set the pattern for procedural innovations in many other countries,[75] but lay also in the unprecedented zeal with which he ensured that the objects to which his great work was devoted were fully accomplished. It contrasts with the fate—half a century earlier—which befell David Dudley Field's great work aiming at a full merger of law and equity pleading in New York. Fortunately, Franz Klein, as compared with David Field, was able to take the helm and make certain that the courts grasped what his innovations meant. Having been the head of the Legislative Department of the Ministry of Justice and, later, Minister of Justice, the eminent jurist exercised indefatigable control over the career of the new law during its first decade, with telling effect.[76]

[72] 1 Pollak, *op. cit.* (note 47, *supra*) 482. Where despite judicial attempts to get proof-designations for an allegation, the parties fail to offer them, the court will pass judgment according to that rule of substantive law which is applicable to the situation, i.e., it will, depending on whether a factual premise for a claim or a defense is, thus, unproved, dismiss or uphold the complaint. 2 Pollak *op. cit.* 656. The burden means "the risk of non-liquet." *Cf.* Stein-Jonas-Schönke *op. cit.* §445 III.

[73] During the almost 30 years of this author's practical experience in Austrian civil procedure, he was not once faced with a burden-of-proof question. See also Pollak in 1 Leske and Loewenfeld, Die Rechtsverfolgung im Internationalen Verkehr (2d ed. 1930) 204. Either party has an interest in the ascertainment of a material fact element, the one side affirmative, the other negative. The risk of nonascertainment of such a fact is called "*Feststellungslast*" (burden related to the factual basis). It is this side of the burden to which also the duty of the court refers, i.e., to see that the media to prove the facts are fully stated. *Cf.* Nikisch, Zivilprozessrecht (1950) 318.

[74] See note 72, *supra*.

[75] For the influence of Klein's Code on the subsequent procedural reforms in Hungary, Yugoslavia, Poland, Czechoslovakia, Denmark, and Norway, and on the amendments in Germany, see Martin Wolff *op. cit.* 233.

[76] Grabscheid, "Klein's Gerichtsinspektorat," in Festschrift für Franz Klein, *op. cit.* 233 ff.

The Austrian law, like other Continental laws, contains of course legal norms involving the burden of proof, that is to say, norms which show the factual premise which must be proved to substantiate a claim or defense. In Austria as in France and Italy, the legislative treatment of burden of proof is to be found, if at all, in the provisions of a civil code rather than in those of the code of civil procedure. Why is this so? Since, on the one hand, the ascertainment of a factual premise prescribed by the appropriate rule of law controls the outcome of the case and, on the other hand, the existence of the factual premise is a part of the substantive rule, a civil code rather than a procedural code has become the repository of rules on burden of proof.[77]

Regarding German law, Professor Rosenberg questions the view that the problem of burden of proof is a procedural one, and emphasizes that for purposes of conflict of laws, of the delimitation of national from state jurisdiction, and finally for appealability to the highest court (*Bundesgerichtshof*)—such appeal can be had on a point of law—most of the burden-of-proof rules must be construed as rules of substantive law rather than of adjective law.[78] The civil codes abound with provisions formulated in a manner indicating the distribution of the burden for a specific situation. However, the Swiss Civil Code, in contrast to other civil codes, even includes in Article 8 a general rule[79] which is a reminder of and in some degree an improvement upon various classical formulae.[80] Professor Egger, the noted Swiss civilian, sees the primary value of the Article in the establishment of the burden problem as a problem of substantive law, thus exempting it from cantonal jurisdiction on procedural matters, since substantive law pertains to federal jurisdiction.[81] Specific statutory provisions are very helpful in indicating where the burden lies, such as the

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[77] *France:* Code civil, Art. 1315 (in the chapter entitled: "On the proof of obligations and of payment"); but the provisions are given an application extending beyond obligations. See 2 Planiol, Traité Élémentaire de Droit Civil (9th ed. 1923) nos. 5, 49; *Italy:* Codice Civile, Art. 2697. The Austrian, German, Scandinavian, and Dutch civil codes do not include a general enactment on problems of burden of proof, but they contain many special provisions. As for Austria, the dominant view considers the burden of proof as a problem dealt with in the substantive law. 1 Ehrenzweig, Oesterreichisches Privatrecht (2d ed. 1951) 368. A very few provisions are to be found in the ZPO. See §§310, 312.

[78] Rosenberg, Die Beweislast (3rd ed. 1953) 78 ff., 222.

[79] Art. 8 reads: "Where the law does not determine otherwise, he who asserts a right arising from a fact has to prove the fact" (author's translation).

[80] "*Affirmanti incumbit probatio,*" C. 4, 19, 23. Or, "*Ei incumbit probatio qui dicit, non qui negat,*" D, 22, 3,2.

[81] 1 Egger, Kommentar zum Schweizer Zivilgesetzbuch (1930) 120. It is worth noting that the same illustrious author adds, speaking of the effect of Art. 8: "*In der Sache selbst bleibt alles offen.*" See also Rosenberg, Die Beweislast (3rd ed. 1953) 119.

word "unless . .," and the like.[82] Important are also decisional precedents and presumptions.[83]

X

A few words should be devoted to the theory of presumptions in Continental law. Compared with the conflicting terminology which we often meet in New York decisions, the language used by Austrian, French, and Italian authorities is fairly clear. The terminology differentiates between logical inferences and genuine presumptions. The former, which are mere deductions, are called presumptions of facts (*tatsächliche oder einfache Vermutungen, présomptions de l'homme ou présomptions simples, presunzioni semplici*); they have no binding effect, for they are inferences which a judge in his free discretion may draw from certain facts to other factual matter.[84] In this, everything is left to the wisdom (*prudenza*) of the judge who shall use them, as the Italian Civil code says, only "if they are weighty, exact and consistent."[85] These inferences supply a prima facie case which may or may not justify a judgment, depending on the persuasive force such conclusions might have if based on all circumstances, including explanatory evidence arguing for the opponent's case.

A sharp distinction must be made between such inferences and the "genuine presumptions." The latter are called legal presumptions (*gesetzliche Vermutungen*),[86] for they are rules of law which direct the court to assume the existence of the "presumed" fact if the court is convinced of the existence of the basic fact. In other words, the application of the legal presumption is not a matter of discretion, but of law, because the lawgiver, not the judge, has made the inference from the basic fact to the existence of the presumed fact.[87]

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[82] 1 Cohn, Manual of German Law (1950) no. 98.

[83] 2 Unger, Austrian Private Law (3rd ed. 1868, in German) 567. A typical fact has been regarded prima facie as the proximate cause for any accident unless the adverse party should prove otherwise. In our law, *res ipsa loquitur* represents one of the theories conceived in order to alleviate the harshness and rigidity of the Anglo-American burden-of-persuasion rule in favor of a plaintiff by way of shifting the burden of coming forward with evidence to the defendant. Courts in general show great reluctance to direct a verdict upon plaintiff's proving no more than the damaging event. The result might be entirely different abroad. For decisions of the German Reichsgericht see 2 Siber, Grundriss des Deutschen Bürgerlichen Rechts, (1931) 449.

[84] 1 Ehrenzweig *op. cit.* 374 ff., 2 Unger *op. cit.* 578 ff.

[85] Italian Codice Civile, Art. 2729. Similar is the approach in French law, Morel *op. cit.* 380, and in Austrian law, 2 Unger *op. cit.* 578–580 ("*praesumptiones hominis, facti*").

[86] French legal language calls them, therefore, "*présomptions légales*" and the corresponding German term is "*Rechtsvermutung.*" Continental writers often use the Latin expression "*praesumptio iuris.*"

[87] See e.g. *Austria:* ZPO, §270; *Italy:* Codice civile, Art. 2727; *Germany:* ZPO, §292. One may therefore say that all presumptions are "statutory presumptions."

Looking at the New York scene, we see in contrast to this that according to the Thayerian view, which is the dominant one, even a presumption of law loses effect upon introduction of evidence by the opponent. In other words, a genuine presumption shifts only the burden of producing evidence, not the burden of persuasion, upon the opponent. As soon as the latter puts in some evidence, the presumption "vanishes." It has no evidentiary force whatsoever and the jury is at liberty to find the nonexistence of the "presumed" fact.[88]

Lest any mistake arise, it should be emphasized that this great difference in the probative effect of presumptions has nothing to do whatsoever with the question of their being rebuttable.[89] Thus, if the law opens the door for an opponent's rebuttal of the "presumed" fact, the application of the legal presumption depends on the force and efficacy of the rebuttal evidence. Since the weight to be given to the rebuttal evidence depends in any case on judicial valuation of all the evidence taken and the whole of the proceedings, no room is left for a classification of presumptions based on the weight given to each of them *per se*.

XI

The Austrian code (and other Continental codes) have accepted the principle of free evaluation of evidence, following the idea pronounced by the decree of the French Constituent Assembly of 1791 which instituted the criminal jury.[90] This principle stands in direct contrast to that of the formal proof rules which prevailed in earlier procedure. It gives the court freedom to follow its own conviction in determining the degree of evidentiary force which should be attached to the several means of proof.[91] As a result of the operation of this principle, particularly conspicuous in the procedural codes of Austria, Germany, and the Scandinavian countries, only a very few strict rules on the *admissibility* of evidence have survived. The contrary holds true of our law, which consists chiefly of rules regulating the admission of evidence.

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[88] Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) 339; 9 Wigmore, *op. cit.* §2491; 1 Greenleaf, Evidence, §44. McKelvey, Handbook of the Law of Evidence (5th ed. 1944) 124 ff. Compare the Model Code (of the American Law Institute) 52 ff. and Rule 704 (1942).

[89] See *Austria:* ZPO, §270: "Unless the law forbids the taking of rebuttal evidence against the fact presumed." In such a case the presumption is irrebuttable, viz., *praesumptio iuris et de iure*.

[90] The jury was admonished in the *Instruction* of 1791, October 21, not to look to the number of witnesses or indicia, but to ask itself the one question, "Do you have a profound conviction?" These words have been repeated in the Code d'instruction criminelle, Art. 342(4). In the first decade of the 19th century, civil procedure adopted the principle.

[91] 2 Cohn, Manual of German Law (1952) 39; Engelmann-Millar, *op. cit.* 609.

For example, the question whether hearsay evidence, or opinion evidence, or evidence apparently too remote from the issues, shall be admitted, is one which *abroad* cannot be answered in the negative by a strict rule of law. An Austrian judge will in each case decide whether, depending on the circumstances, such types of evidence should or should not be admitted. Since he has to decide how much probative value is to be ascribed to the evidence, it would be meaningless to fetter his discretion by strict rules on admissibility.[92]

Furthermore, the principle of free evaluation means evaluation not only of the evidence taken, but also of the nonevidentiary contents of the proceedings. This includes, therefore, the allegations of the parties, the manner in which they are stated or answered, the credibility possibly derived from the conduct of the parties, and all the other attending circumstances. In this sense, the expression "free evaluation of the proof," is inaccurate.[93] Nor does free evaluation mean resort to unfettered discretion. The codes command that a court must state in its judgment all the reasons for its evaluation of the evidence.[94]

XII

There are, of course, exceptions everywhere to the principle of free evaluation of evidence. One may ask whether a rule similar to our pleading rule has not survived: namely, the rule under which a material allegation in a pleading, which is not denied in the responsive pleading, is deemed admitted. Naturally, prior to the recent codes, as the old Austrian Procedural Ordinance of 1781 shows, the rule in many foreign laws was similar.[95] At present, there is in Austria no rule of law that failure to make an express denial of an allegation is equivalent to an admission. On the contrary, the existing rule directs the judge to conclude, upon consideration of the whole attitude of the opponent during the proceedings, whether or not the absence of an express denial should be regarded as confession or admission.[96] This is but the application of the principle of free evaluation of evidence to the problem of implied confessions or admissions[97]

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[92] *Id.* 39.

[93] Nikisch, *op. cit.* 331.

[94] *Cf.* Austrian ZPO, §272(3); German ZPO, §286 I 2.

[95] *Austria:* General Procedural Ordinance, 1781, §11.

[96] *Austria:* ZPO, §267 (1). The present French law (since 1942) is similar. See Morel *op. cit.* nos. 489, 510.

[97] The German law assumes admission of an alleged fact which is not controverted. See German ZPO, §138 III.

which also controls the treatment of extrajudicial admissions,[98] and the question of a withdrawal of a judicial confession.[99]

Rules restricting the admissibility of evidence[100] are of significance in the Romanesque laws with respect to oral evidence. (See next section). In those countries important proof rules based on the party oath have survived. Neither this restriction nor the party oath are a part of Austrian law (See *infra* section 16).

XIII

One has to take a historical approach to see why the notions underlying the Romanesque treatment of evidence have allotted a rather negligible role to parol in contrast to documentary evidence. By the Ordinance of Moulins, 1566, French law established the principal requirement of written form for contracts.[101] It certainly is not surprising to find that, hand in hand with the requirement of written form, other than written evidence came to be excluded in the case of transactions subject to the written-form rule.[102] While there were various reasons for the emergence of such a legal principle, it is no accident that it appeared at a time when literacy no longer was monopolized by the clergy. Before that, a converse view had prevailed as expressed in the maxim "witnesses are better than writings" ("*témoins passent lettres*"). At the beginning of the Modern Age, knowledge of reading and writing had become more and more popularized.

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[98] *Austria:* ZPO, §266 (3).

[99] *Austria:* ZPO, §266 (2). While by German law, admissions can be withdrawn, a confession cannot. For exceptions, see Rosenberg, Lehrbuch, 511. This view is based on the theory that the judicial confession is a "declaration of intention" (*Willenserklärung*) to accept the opponent's allegation rather than an admission of the existence of a fact (*Wissenserklärung*). For criticism, see 2 Pollak, *op. cit.* 643. Yet see German ZPO, §289 II. The Austrian view is different, allowing for a revocation. Until revoked, the judicial confession is deemed to be a full proof of the fact. See ZPO, §266; Pollak 644.

[100] An interesting example: By French law, the "judgment" ordering an *enquête*, i.e., the only form in which testimony can be obtained, requires a judicial ascertainment of the facts actually in dispute in an incidental proceeding. This point has been discussed elsewhere in this paper. Such incidental proceedings are not required where the single judge orders the examination of a witness *ex mero motu*. French C. proc. civ., Art. 254; see also Art. 81 (2). Since oral extrajudicial admissions must not be proved by witnesses in the great many situations for which proof by witnesses is inadmissible, they have no significance at all. 2 Planiol, Traité Élémentaire de Droit civil (9th ed. 1923) no. 30. However, in proceedings before the commercial courts, and in summary proceedings, the law provides for the taking of testimonial evidence by the full bench. C. proc. civ., Art. 407, 432.

[101] Ordinance of February 20, 1566, Art. 54. See the text (translated) in Brissaud, A History of French Private Law (tr. by Howell, 1912) 377.

[102] Colbert's *Ordonnance sur la procédure* of 1667, (tit. XX, Art. 2) had adopted the provision of the Ordinance of Moulins and expanded its rule to all transactions capable of being committed to writing.

Thus, the advantages of documentary evidence, being by its nature "preconstituted" evidence, over testimony, came to be realized; only the former consists of statements made *ante litem motam*. No suspicion of subornation, corruption, or distortion can be entertained against written evidence. Thus, the new principle turned the above maxim into its opposite: "*lettres passent témoins*." This also appeared a good means to effect a good end, the avoidance of "complicating of lawsuits."[103] However, the hopes thus entertained were not entirely fulfilled; the largest benefit went to the notaries, who, a few years before, had succeeded in securing a monopoly for drawing up legal instruments.[104]

However, the principle survived the Revolution; it has been incorporated in the *Code Civil*, so that proof by witnesses is excluded with respect to all so-called "legal acts" (*actes juridiques*), i.e., transactions by which rights are sought to be created, conveyed, confirmed, modified, or extinguished. The principle applies whenever the object involved in the "legal act" has a value of more than 5,000 francs.[105] Obligations created by immediate operation of law, such as those resulting from tortious acts or quasi-contractual situations, are not within the rule.[106] Commercial transactions also are expressly exempted.[107] In addition, there exist certain special exceptions to the rule. In the first place, it is interesting to note that sixty years ago the *Cour de Cassation* reached the conclusion that the policy of the principle of exclusion of oral evidence is for the protection of the defendant; hence with his consent testimonial evidence may be introduced.[108] This view has been followed by the courts ever since, although the majority of the theoreticians still lean toward the opposite view.[109]

In the second place, the "rights" affected by the "legal acts" to which the principle applies must be "economic" rights as distinguished from

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[103] 1 Raoul de la Grasserie, De la Preuve 55 ff.; (1912) 106 ff.; 2 Planiol, *op. cit.* no. 1105. See also O. E. Bodington, An Outline of the French Law of Evidence (1904) 42 ff.

[104] Edict of November 1542. See Brissaud, A History of the French Public Law (tr. Garner, 1915) 470. See also Bodington, *op. cit.* 43, that "people asked sarcastically whether every time they went to market they must take a notary with them."

[105] French Code Civil, Art. 1341. Bodington, *op. cit.* 43.

[106] C. civ., Art. 1348, no. 1. A third person may use testimonial evidence to prove the "simulated" character of a deed. Cass. December 9, 1913, P. et S. 1914.1.359; Cass. May 30, 1900, 1901.1.37. Since between the parties themselves the simulated act rests upon an understanding, the latter falls within the rule excluding oral evidence. See 2 Planiol, *op. cit.* no. 1204.

[107] C. civ., Art. 1341 (2); Code de commerce, Art. 109 (applicable to all commercial transactions, its narrow wording notwithstanding). However, there are several provisions requiring a deed, for the proof of which a kind of parol evidence rule exists. C. comm., art. 41.

[108] (Cass.) Civ. June 1, 1893, D.P. 93.1. 445. See also Req. July 18, 1907, D.P. 1910.1.79.

[109] Planiol, however, agrees with the decisional results. 2 Planiol, *op. cit.* no. 1106.

"family" rights and "personal" rights. Moreover, the "legal acts" embraced by the principle do not include acts *mortis causa*, which are, of course, subject to special forms regulated elsewhere in the Code Civil. The third important exception, viz., "existence of a commencement of written proof,"[110] is practically of the greatest significance. Any scrap of paper, even if not signed, such as a private letter, or a trader's notebook, or a simple note, or a written pleading, has been regarded as a sufficient basis for the admission of oral evidence.[111] Concerning this exception, the Code sets up only two requisites: the writing must have emanated from the person against whom the action is brought,[112] and it must tend to make the alleged fact probable.[113] Considerations of brevity preclude further treatment of these exceptions.[114]

XIV

Although the law in most countries follows the idea of free evaluation of evidence, formal rules of proof determine the probative force of documents. Thus, in order to constitute admissible evidence in a pending case, French law requires the documents on which a party has relied upon or will rely to be communicated to counsel of the adverse party before they are presented to the court.[115] Under Austrian law the procedure is informal; documents are usually not included in the proof order. The parties present them to the court prior to, or during the hearing.

Turning to another aspect of proof rules concerning documents, the distinction between public and private documents calls as much for attention as that between documents, both public or private, recording a legal disposition (*Dispositivurkunde*) such as a judicial decision, a revoca-

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[110] Code civil, Art. 1347 (1).

[111] (Cass.) Req. April 13, 1908, D.P. 1908.1.363; Civ. December 2, 1907, D.P. 1908.1.202. Req. Nov. 4, 1901, D.P. 1901.1.528.

[112] The requisite is complied with where the writing has emanated from the person represented by the defendant. C. civ., Art. 1347 (2).

[113] Whether this second requisite is met, remains a question for the free evaluation of all the circumstances of the case by the court. Bodington, *op. cit.* 49.

[114] Thus, obligations are not in the rule, where they arose from acts which, although consensual, could by reason of extraordinary circumstances not be put in written form. Such is the case, for example, with deposits made in case of fire, shipwreck, or by guests stopping in a hotel. The same idea underlies a holding taking out of the rule an emergency loan given by a friend to a traveller whose wallet was stolen. C. civ., Art. 1348, no. 2. See also no. 3. The loss of a document resulting from an unforeseeable accident falls within the same category, and the creditor is allowed to substitute oral for the written evidence of which otherwise he could have availed himself. C. civ., Art. 1438, no. 4.

[115] Refusal to disclose such evidence in advance of the hearing hardly occurs. Morel, *op. cit.* 383 ff. If it occurred, disclosure would be enforced in an incidental proceeding. C. proc. civ., Art. 188 ff.

tion of a license, a contract, a bill of exchange, a will, and those simply attesting the occurrence of an event (*Zeugnisurkunde*), such as the minutes of the hearing before a tribunal, the certification of a signature, the transcript from a Register of Births, Marriages, and Deaths.[116] Among private documents, the writings signed by the parties (*acte sous seing privé*[117]) are given special status in the French law of evidence.

A public document[118] containing declarations presenting a legal disposition, such as a contract, is conclusive evidence of the fact that the declarations were made.[119] However, according to Austrian law, the opponent may prove that the recording was incorrect,[120] while, where dispositive acts of the parties are involved, French decisional law goes as far as to allow proof rebutting the validity of the declaration.[121] An attack on the correctness of a fact attested by a public officer calls for a special and very complicated proceeding, called *inscription en faux*,[122] the proponent being burdened with its initiation and with the evidence for his attack.

A signed private document, whether of dispositive or of merely attesting character, has by French law the same probative effect as a public document would have, provided the party against whom it is produced admits his signature or, at least, does not explicitly deny it.[123] In case of denial, an incidental proceeding for "verification of writings" deals with the question whether the signature is genuine.[124] The regulation of the burden-of-proof question by Austrian law is similar; however, its determination does not require a special or incidental proceeding.[125]

[116] Rosenberg, *op. cit.* 532; Pollak, *op. cit.* 678.

[117] French C. civ., Art. 1322. A variety of private documents exists. For the various classes of private documents in French law, see C. civ., Arts. 1322, 1326, 1329, 1331.

[118] They are called "*acte authentique*," "*atto pubblico*," "*öffentliche Urkunde*," respectively, by the French, Italian, German, and Austrian laws. Such a public document may be (a) a record of a judicial or administrative act performed by a public officer or (b) a record of an extra-official occurrence, such as the execution of a private contract before a public officer. The continental notary, who must be a trained lawyer (in contrast to his mere namesake in Anglo-American law) is a public officer. For his duties, see Bodington, *op. cit.* 10.

[119] Rules on the probative force of public documents are to be found in French C. civ., Art. 1319; Italian C. civ., Art. 2700; German ZPO, §415 ff.; BGB, §128; Austrian ZPO, §§292, 293.

[120] Rosenberg, *op. cit.* 534; Pollak, *op. cit.* 679.

[121] (Cass.) Req. January 4, 1897, D. P. 97.1.126.

[122] It is regulated in C. proc. civ., Art. 214 ff. For details see Morel, *op. cit.* nos. 483–486.

[123] C. civ., Art. 1322. Morel, *op. cit.* no. 480; Bodington, *op. cit.* 22.

[124] However, in this proceeding the burden of establishing the signature is upon the producing party by "*vérification de l'écriture*," which can be done, *inter alia*, by experts and witnesses. Similar is the treatment in the Italian law. 2 Redenti, *op. cit.* 66.

[125] *Austria:* ZPO, §§310, 312 (2); *Germany:* ZPO, §§437, 440. The Austrian and German codes give private documents the effect of being full evidence of the fact that the declarations stated therein have been made by the signer or signers, but the validity of those declarations is subject to attack by the opponent. Rosenberg, *op. cit.* 534.

XV

In the Austrian law from medieval times down to Klein's reform, the oath of a party as a means of proving a proposition of fact determinative of the cause, was with some variations prominent among regular forms of proof. The rigid proof rules forced the court to hold a claim proved, beyond any attack, upon the taking of an oath by the claimant. With variations in detail, this was the law also in other Continental countries.[126] In contrast, in New York and other American states, the oath never existed as a means of proof *per se*. In Austria, the oath as a means of proof was entirely abolished in 1895.

However, in the Romanesque countries, the oath of the parties has not yet lost significance as a means of proof with conclusively binding effect upon the court. The Italian and French laws distinguish between decisory and suppletory oaths. The former may be tendered only by one party to the other, thus making the result of the case depend upon the taking of the oath by the latter. Such a tender has been legally analyzed as being in the nature of a convention.[127] Consequently, it can occur in any action which is subject to settlement by the parties, and at any stage of the proceedings.[128] If the person from whom the oath is demanded,[129] refuses to swear, he loses the case. If he swears, he wins. A third course is open to him, to tender the oath back to the other party, provided the facts in issue are also "personal" to the latter; if the latter takes the oath, he thereby effects a decision in his favor. If he refuses to swear, the former wins.[130] Thus, this whole mechanism operates as a method of making the decision independent of the judge's conviction, for evidence rebutting the facts sworn is out of the question.

A detailed discussion of the *suppletory oath* destined to lessen the risk involved in the burden of proof which might lead to an "all or nothing"

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[126] Engelmann-Millar, History, 39 ff., 129 ff.; 6 Wigmore, *op. cit.* §1815.

[127] 2 Planiol, *op. cit.* no. 2306.

[128] The decisory oath is therefore out of the question in proceedings controlled by the *principle of officiality* (*Offizialprinzip*); for this principle see Engelmann-Millar, *op. cit.* 16. Accordingly, such an oath can not be tendered, e.g., in a matrimonial proceeding. (Cass.) Civ. May 5, 1886, D.P. 1886.1.467. The same applies to Italian law, see C. civile, Art. 2739 (1).

[129] The facts embraced by the oath are required to be "personal" to the party; otherwise the refusal to swear the oath would be justified. See C. civ., Art. 1359. "Personal" has been understood to mean things done by him or in his presence. French C. civ., Art. 1359 ("*faits personnels à la partie à laquelle on le défère*"). Thus, the same requirement must be met when the party to whom the oath was tendered, tenders it back. Furthermore, the facts must be "material" to the issues. Bodington, *op. cit.* 73.

[130] French C. civ., Art. 1361; Italian C. civ., Art. 2737/2739. For the Spanish law, see Millar, Fact-Discovery, *loc. cit.* 293.

result,[131] must here be omitted. It suffices to say that only the court may tender it to one or the other of the parties and that the selection is in the court's discretion depending on who has so far offered the more convincing proof.[132] The French opinions seem to be divided, with the majority favoring the view that not even the court is bound by the suppletory oath when it is taken by the party to whom it was administered. If the latter refuses to take it, judgment need not necessarily go against him.

XVI

For proceedings concerning causes of smaller value in 1873, and for all other proceedings in 1895, Austria abolished the party oath,[133] which particularly in the form of the decisory oath, owing to its mechanical structure, eliminates the free evaluation of the fact situation by the court.[134] The mechanical forms were replaced by a new means of proof called "examination of the parties."[135] The admissibility of such "proof" is a consequence of the replacement of formal proof rules by free evaluation of all proof by the court. Nevertheless, depositions by persons directly interested in the outcome of the suit are not *per se* entitled to indiscriminate admission, and are therefore regarded by the Austrian code

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[131] French C. civ., Art. 1366 ff.; Italian C. civ., Art. 2736 (2). No tendering back of the suppletory oath is allowed.

[132] As the word "suppletory" indicates, this oath will not be tendered until some evidence has been taken, which however seems to be not yet sufficient to satisfy the court fully on the matter at issue. From this rule the French doctrine infers that the suppletory oath is a merely procedural "measure of inquiry." One may notice the contrast to the approach to the decisory oath, discussed previously. See 2 Planiol, *op. cit.* 33. The facts to which the suppletory oath refers need not be within personal knowledge, but must be material. See French C. civ., Art. 1366; Italian C. civ., Art. 2736 (2); (Cass.) Req. February 14, 1898, D.P. 98.1.112. The laws treat the "estimatory oath" as a type of the suppletory oath. This oath can, of course, be administered only to the plaintiff. It is an oath concerning the amount of damages where the claim to damages was proved but the determination of the amount cannot be proved or is not ascertainable otherwise. However, the judge shall in such case determine the maximum beyond which damages will not be fixed. Code civile, Art. 1369. For the Italian law, see 2 Redenti, *op. cit.* 75.

[133] Engelmann-Millar, 633, 640.

[134] Wigmore, *op. cit.* 2032.

[135] The parties are examined without oath. ZPO, §376 (1). However, if the court is not satisfied with the proof supplied by such an examination, it may select one of the parties—not both—and direct this party to repeat one or several allegations (which are selected by the court) under oath. ZPO, §377. It may be noted that the German amendment of 1933 adopted this provision. *Germany:* ZPO, §452 I. On the other hand, this amendment directed the court to hear "witnesses" (i.e. nonparties) as a rule without oath. 2 Cohn–Meyer, *loc. cit.* 62. One must not overlook that by German (and also by Austrian) criminal law false testimony given by a witness or expert before a court constitutes a crime even if not given under oath. German Criminal Code, 1871, §153.

as a purely subsidiary means of finding the truth respecting facts in controversy. It was Klein's idea that the court may resort to it only exceptionally,[136]—on application of either party or *ex officio*—where such facts "had not sufficiently been established either by proof introduced by the parties or by proof taken by the court *ex mero motu*."[137] The lack of reliability inherent in statements of a party is also reflected in another provision of the Austrian code: parties shall never be regarded as witnesses.[138] These two essential features distinguish the Austrian innovation from the Anglo-American examination of parties derived from the English Evidence Act, 1851, an act which made parties generally competent to testify as witnesses.[139] Thus, although the great Austrian reform of procedural law of 1895 utilized the idea, it modified it substantially.

If it were not self-evident that "applied comparative law has always been considered the most important aspect of Comparative Law,"[140] these Austrian innovations of 1873 and 1895 would make a good case. To quote from the noted German proceduralist Professor Rosenberg: "The provisions of the Austrian Code (ZPO, §371) became the model for the Codes on Civil Procedure of Japan, §§360 ff. (1898), Hungary, §§368 ff. (1911), and Poland, Articles 323 ff. (1930). In recent years the examination of parties was adopted by the Procedural Act of Norway, §§111 ff., (1915) and by the Judiciary Act of Denmark, §§301 ff. (1916). Also the Swedish Procedural Act, 1942, although working out this proof in its own way, shows the influence of the Austrian Code."[141]

XVII

In conclusion, the foregoing discussion has been intended to indicate no more than the possibilities of a comparative treatment of an important

[136] After the First World War, many courts have more frequently than before resorted to the examination of the parties, so that the word "exceptionally" points to the draftsman's intent rather than to the present practice in Austria.

[137] *Austria:* ZPO, §371.

[138] *Cf.* 2 Cohn and Meyer, Manual of German Law (1952) 60, no. 94. "It is a fundamental rule of the German law of Civil Procedure that the parties to a suit cannot as a rule be witnesses. This rule is based on the assumption that evidence given by a party can never compare in reliability with that of an independent witness . . ." For other practical consequences of the distinction, see the example in Rosenberg, *op. cit.* 430.

[139] 14 & 15 Vict. c. 99 §2. The Connecticut Act of June 27, 1848, Conn. Public Acts c. 80 p. 71, preceded it but the former Act, in turn, followed Lord Denman's Act, 6 & 7 Vict. c. 85 of 1843 and the County Court's Act of 1846, 9 & 10 Vict. c. 95 §83. Millar, Civil Procedure, *op. cit.* 207.

[140] M. Schmitthoff, "The Science of Comparative Law," 7 Cambridge L.J. (1939) 94, also in Schlesinger, Comparative Law: Cases and Materials (1950) 1, 6.

[141] Rosenberg, *op. cit.* 550. On the German Act of 1933 (which abolished the oath and introduced the examination of parties) he says: "In the main, it follows the Austrian Code."

part of procedural law. In comparing the legal aspects, too little has been said about merely practical approaches, particularly with regard to trial preparation.

At least one of these should be mentioned. In Austria, a witness is regarded as a court's witness rather than that of a party.[142] In New York and in England, witnesses including experts, even in tort and other noncommercial cases, are customarily first interrogated privately by counsel who intends to introduce such witness as evidence in the trial.[143] A witness' impression has thus lost its spontaneity at the time when he is being examined before the court. Legal ethics in Austria condemn such a practice.[144]

This attitude is only one among so many other factors described and discussed in this paper, through which the Austrian law seeks to fulfill the task of bringing out the truth in a civil proceeding. Naturally, this law does not consider a party to be bound by the testimony of a witness, whose testimony the party had offered. Thus, the reader may form his own opinion whether with respect to the reliability of witness evidence, the safeguards of the Austrian law are inferior to those inherent in our cross-examination.

Obvious equivalences in American and Continental law, such as judicial notice, have herein been omitted by design. However, much more could be said about several aspects of criminal litigation, so far as they resemble its civil counterpart in fundamental ideas. This is true of the accusatory system paralleling the adversary system in civil procedure, and of the free evaluation of evidence. With respect to orality and immediacy, it can fairly be stated that the law, not only of Austria but also of countries which to some extent depart from these principles in civil procedure, applies them in criminal cases. Thus, the judgment must be based exclusively on proof produced at the trial. Documents must be read out at the trial to make them admissible evidence. Only exceptionally, i.e., where oral examination of witnesses has become impossible, may judicial records of their testimony delivered prior to the trial be read.

In contrast to his counterpart in New York, an Austrian, French, or Italian judge presiding over a criminal trial, like his brother in the civil chamber, conducts the interrogations. It is he who appoints the experts. He directs the attention of the witness to divergencies between his oral

[142] This is also the view of the German law: 2 Cohn and Meyer, *op. cit.* 61, no. 100.

[143] See Lord Chorley's (*loc. cit.* 513), criticism of "building up a case" in civil litigations by coaching the witnesses beforehand.

[144] Lohsing, Anwaltsrecht (2d ed. by Braun, 1950) 72. For a similar attitude in other European countries, see Schlesinger, *op. cit.* 207 (Note).

statements and his previous depositions made during the preliminary stage before an "investigating judge." He can do the same with respect to the accused in the event that the latter elects to submit to an interrogation. The accused can never be a witness.

In further contrast to New York law, official records presenting evidence of former convictions of the accused are usually procured *ex officio* prior to the trial and are read at the trial. In a civil action, New York law in general does not permit[145] proof of a prior conviction even in respect of the same transaction which constitutes the basis for the civil action. By Austrian law, such a conviction constitutes conclusive evidence of culpability in the civil action.[146] Clearly this presents a proof rule which is one of the few exceptions to the principle of free evaluation of evidence, so strongly stressed in Franz Klein's legislative work for Austria.

It is fitting and proper that this paper, dedicated to the ideology of the Austrian Code, should be presented by one of Franz Klein's students and disciples in commemoration of the centenary of his birth, April 24, 1854.

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[145] See for example Walther v. News Syndicate Co., 276 App. Div. 169, 93 N.Y.S. 2d 537. (1950).

[146] *Austria:* ZPO, §268.

MARIO ROTONDI

The Proposed Franco-Italian Code of Obligations[1]

THE HISTORY OF THE PROJECT OF THE Code of Obligations for France and Italy is well-known. The idea advanced by Vittoria Scialoja during the First World War[2] and warmly received by the Faculté de Droit of Paris, notably by its distinguished dean, Professor Larnaude, led to the creation of two committees, one in Italy and the other in France, over which Scialoja and Larnaude presided. Created through private initiative, the two committees commenced their deliberations in 1917, and the first results of their labors were published as early as 1920 in both countries. However, these private efforts soon received official recognition. In Italy, when the "Commission for the Study of the Problems in the Transition from War to Peace" was formed by Decree No. 361 of March 21, 1918, the committee became one of the sections (the ninth, eventually to be combined with the eighth), ultimately surviving the dissolution of the Commission itself; in France, the unofficial committee, by Decree of February 18, 1929, was transformed into a Commission of Studies under the auspices of the Ministry of Justice.

Nevertheless, after the first enthusiasm, the work proceeded more slowly, so that it was only after an interval, indeed ten years after the first sessions, that the text of a project in definitive form could be published in 1927. This embodied the collaboration of a number of the most celebrated jurists of the two countries: suffice it to recall among the Italians, MM. Scialoja, Ascoli, Buzzati, Segré, De Ruggiero, Azara, and among the French, aside from Dean Larnaude, MM. Colin, Capitant Julliot de la Morandière, Ripert, and others. The project was accompanied by an extensive report, prepared by Ascoli, De Ruggiero, Capitant, Colin, and Ripert, the reporters. But meanwhile the international political situation had changed; new, grave political problems in both countries diverted the attention of the legislatures from the fruitful work of legislative co-operation which had been commenced. In 1935, during a bright

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[1] General Report at the *Journées de l'Association Henri Capitant*, held at the University of Pavia, September 10–13, 1953.

[2] "Per un'alleanza legislativa fra gli Stati dell'Intesa," Nuova Antologia, 1916, p. 450.

interval in the political skies, the representatives of the two countries again gathered at Paris to proceed with a revision of the project and even its extension through unification of commercial contracts. We recall among the jurists invited to participate, MM. Picard, Hamel, and Amiaud, among the French; MM. Vivante, Sraffa, Rocco, and others, among the Italians. However, no official text of the project was drawn up, and the last meeting was held at Rome in 1936.

So far as concerned civil obligations in Italy, it was possible in 1936 to submit the draft for consideration by a parliamentary commission. But the general reform of the Italian Civil Code was at the time impending, and the project was withdrawn in October, 1939, to be replaced by a draft of what subsequently became book IV of obligations in the Italian Civil Code. Likewise in France after the war, the reform of the Code Napoléon was independently undertaken, and the beautiful dream of uniform legislation on obligations in Italy and France seemed to have disappeared forever.

Was then the work fruitless? Assuredly not; it was very largely used in the elaboration of the Polish Code of Obligations (1937); it inspired the Albanian (1927), Rumanian (1934), and Greek (1940) codes, and certainly exercised—as M. D'Amelio emphasized—influence on the development of Italian jurisprudence. And the fact deserves to be remarked that when a project of uniform Italo-German legislation was proposed, its proponent, Professor H. C. Nipperdey, declared that "the system of the Italo-French project of 1927 seems the most suitable to serve as a useful basis of discussion." To its influence on the new Italian Civil Code, i.e., on the book of obligations, reference is made below. But, having acknowledged the valuable contribution made by the project to legislative progress in other countries, must we really record that the dream of uniform Italo-French legislation in the field of obligations must be considered as having definitively vanished?

While, on the one hand, the project of the Italo-French Code of Obligations seems to some utopian or at least premature, others object to the contrary that uniform legislation limited to the two countries is too narrow, having been long since superseded by events which are leading to broader, more inclusive ententes among the states of Europe. Thus, it would seem that, within the framework of this greater union among the states of Europe—the indispensable condition not only to maintain the prestige of the ancient civil-law tradition, but also for the very preservation of our Continent—uniform legislation can and must take place.

It would be easy to answer that these two opposed criticisms—so far as they have some basis—cancel each other. But with whatever optimism one may contemplate the realisation—and perhaps even the desirability—

of a European Union, it is certain that an effort towards unifying the law of two Latin countries, closely related in cultural tradition, in their conditions of economic development, and in their systems of legislation, could constitute a great step towards more extensive unification.

The task of unification becomes more difficult as the jurisdictions participating are more numerous; the drafting of texts requires more arduous efforts in proportion to the number of those who participate; suppression of differences becomes the more difficult as these are the more marked. Thus, prudence dictates starting from the simpler task to reach the more difficult.

It must be added that legislation in each country has its own national tradition and that unification too often tends towards compromise solutions; organic unification is not possible except among sufficiently homogeneous elements; it may even be easy among elements especially homogeneous. The field of obligations and the Italian and French laws seem to be the most promising for such an experiment. Peoples with common or related cultural traditions will not fail to be impressed by this example, and the suggestion will more easily come from an organic and technically impeccable codification, the product of a more limited collaboration (even if narrower in its territorial basis) rather than from an amorphous result, in which the multiplicity of compromise solutions has obscured the basic principles.

This potential and spontaneous attraction of the text of a uniform law will be more readily exercised, if the draftsmen bear in mind, in the elaboration or the revision of the text, that the observations and experiences coming from other countries of high legal culture, are not to be ignored. But the influence of technical perfection in the reception of foreign laws should not be forgotten; Roman law became the common law of Europe as *ratio scripta;* the success of the Code Napoléon is due to its clarity and its balance; numerous more recent receptions—consider that of the Swiss codes in Turkey—have been due to recognition of the excellence and progressiveness of the texts adopted.

A further objection which is raised against reviving the project of unification is that lapse of time—another quarter of a century—has now made it obsolete. It is added, in particular, that Italy has now provided itself with a new code, in which not only the entire subject matter of obligations is included, but in which also the provisions regarding the institutions which were covered by the Code of Commerce are now incorporated. Nevertheless, it does not seem that these objections are insurmountable; indeed, they offer an occasion to present certain considerations which tend to favor the conception of Italo-French unification.

A primary consideration is certainly that for a project of legislative

reform, lapse of time for so many years does not pass in vain. It should not be overlooked that truly does time reveal its relativity as a measure of human affairs. A quarter of a century is a long time in the life of an individual; one may recall only with profound regret how many, unfortunately almost all, of those jurists who dedicated to the project their inspired and enlightened efforts have disappeared. But in relation to things, to ideas, to legal institutions, twenty-five years are little indeed. What are twenty-five years for these institutions of the law of obligations which have behind them an uninterrupted tradition of fifteen or twenty centuries? To what extent will the institutions of the law be affected by these changes imposed or suggested by the experience or by the political conceptions of the last decades?

Too frequently, it occurs in history that a self-centered conception, a defect in perspective, a tendency to overemphasize what most nearly touches us (including contemporary events) tend to create the belief that we are on the threshhold of a new era or face a revolutionary break with the past, while on the contrary, we are merely confronted by a simple indication of a new trend or the accentuation of a development already in progress!

In limiting our attention to those institutions of the private law of obligations which are of interest, it does not seem that these have been substantially transformed even in the course of these last decades. Wider intervention on the part of the state, a certain restriction of the principle of liberty of contract, a tendency towards protection of the weaker contracting party—these are not phenomena of today, and—for my part—I think that, without seeking to oppose new trends, it is not undesirable (and it is also in conformity with tradition and with the function of codification) that the traditional principles should not be too easily abandoned nor too speedily overturned.

With regard to the difficulty which might be presented by the recent codification accomplished in Italy, I believe that it is necessary to define clearly the factors involved in this problem. Considering generally the work of the Italian legislature in the field of the law of obligations, the outstanding fact is without doubt the abolition of the Code of Commerce and the incorporation of a part of its provisions in the Civil Code. This observation—of a purely formal character—is complemented by the further observation, quite different in its substantial significance, namely, the elimination of diversity in the regulation of obligations which, by reason of their objective or subjective elements, would be characterized as commercial.

It is common knowledge that in the French, as in many other laws,

including that of Italy since the most recent legislative reform, there exists alongside of the civil code embracing generally all private relations, a code of commerce, which governs not only certain relations that, whether by nature or by tradition, are deemed commercial by the law, but also many other acts insofar as they involve merchants. It does not follow that a sale, a mandate, a contract, generically speaking, to the extent that it has a commercial object or is completed by a merchant, should be subject to provisions different from those that would apply if it were completed by a merchant and had a noncommercial object. In many legal systems, not only do the provisions concerning the relationship differ, but there also exists an independent commercial jurisdiction.

This distinction—and by equal token this autonomy of the commercial law—unknown to Roman law, arose in the Middle Ages and survived the French Revolution, passing into the Napoleonic codification and the codifications derived therefrom.

The disappearance of the historic reasons which had occasioned the development of an autonomous commercial law, the practical and theoretical disadvantages, the generalization of many principles of commercial law to the civil law, have inspired in many countries a movement to abolish the autonomy of commercial law, that is to say, not only and not so much the abolition of a code, as the unification of the provisions respecting relations formerly subject to diverse rules and, in certain countries, as has been indicated, also to different jurisdictions. The movement for unification of the law of obligations in Italy was initiated by the great commercialist, Cesare Vivante,[3] and had wide response also abroad. But Vivante, without definitively abandoning his idea, later came to the conclusion that implementation of the proposed reform would not be as yet timely. The campaign for unification of the law of obligations and the abolition of the Code of Commerce, however, was renewed by the writer on the occasion of the efforts to reform the Italian legislation, which led to three successive projects of the Code of Commerce, occurring from 1922 to 1942: the projects of Vivante, d'Amelio, Grandi.

The thesis for which M. Vivante himself eventually lost some enthusiasm was taken up and supported by the writer of this article, and has finally been accepted in the present Italian codification. The Code of Commerce has been abolished, and all obligations, independently of their object, or the profession of those by whom they are constituted, are subject to the same discipline.[4]

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[3] Trattato di Diritto Commerciale, I, 1 *et seq.*

[4] *Cf.* regarding this problem and the ensuing polemics the following bibliography: M. Rotondi, "Il progetto di riforma del Codice di commercio," Monitore Tribunali, 1923, pp.

It is common knowledge that many types of contracts, which were found in the former Code of Commerce, now appear in the Civil Code; but this is not to say that the commercial character at present determines the provisions governing an obligation or a specific contract. It is clear that a contract of transport, or of brokerage, or of insurance, remains what it is, and can not be subsumed under the traditional categories of the old Civil Code, but this is not to say that the notion of commercial character survives with substantial effects in the new Italian legislation. Clearly, the limited company survives in the Code, and outside of the Code the bill of exchange, but these are no more commercial than they are civil institutions. Their purpose, their cause, their object, their subjects, are entirely indifferent in dealing with a limited society or a commercial instrument; the applicable provisions are always the same.

It is obvious that one who considers this radical reversal, which is perhaps the most characteristic feature of the new Italian codification, will discover in this a profound innovation as regards the tradition marked by the Napoleonic codification and the first Italian codification. But it should be observed that, even during the preparation of the Italo-French project, it was decided to consolidate in the law of obligations the special provisions relating to obligations and commercial contracts, and that the work had already started on this line. For the rest, this legislative reform which, suppressing the anachronistic survival of now obsolete considerations, involves unification of the law of obligations, not only has venerable support (for example, of the great jurist Teixeira de Freitas in Brazil, even before M. Vivante in Italy) but it also represents a natural and inevitable trend toward "commercialization" of the civil law of obligations.

This trend toward uniformity now finds support in Argentina, in Holland, in Belgium, and in other countries; but what is still more significant, it has been approved for the purposes of the reform of the French codification currently in course. If I am not mistaken, the surviving apprehensions with regard to substantial unification of the law of obligations (of which the suppression of the Code of Commerce is a simple and negligible aspect of external form) spring from fear that the regulation of commercial relations, through unification, may lose certain of its ad-

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428 *et seq.*; "L'autonomia del Codice di commercio sui lavori della Commissione reale per la Riforma dei Codici," Studi in memoria di P. P. Zanzucchi, 1937, pp. 173 *et seq.*; "Des rapports du droit commercial et du droit civil en général et en particulier en Italie," Livre-souvenir des journées du droit civil Français (Montréal), s.d., pp. 847 *et seq.*; Per la riforma della legislazione commerciale, 1942, pp. 1 *et seq.*; "I lavori preparatori per la riforma dei codici in Francia," Rivista di diritto commerciale, 1951, I, p. 74; J. Limpens, "L'unificazione del diritto civile e commerciale," *id.*, 1953, I, p. 417.

vantages of expedition, lack of formalism, etc., by which it is at present characterized, as compared with the regulation of civil obligations. But it is clear that, from a rational point of view, one who would still maintain the necessity of diversification in the legislation respecting commercial and civil obligations, should prove that there exists at least one principle of law the extension of which to civil obligations would be inadvisable and detrimental. If this is not so, the inevitable result of any reform of the law of obligations will be what occurred in Italy when the suppression of the Code of Commerce was not yet decided, namely, that the draft of the Code of Commerce and that of the book of obligations of the Civil Code, separately prepared by different commissions, provided in substance the same principles. Consequently, the resultant unification was in reality spontaneously accomplished without any clear intention.

It has also been asserted that the very fact that the new Italian codification is so recent may form an obstacle to reviving the proposed Italo-French uniform Code of Obligations. In fact, from a formal point of view, it might seem more difficult to replace a text nearly a century old, which everyone considers necessary to reform, by a new uniform text, than to reform an integral book of the Civil Code after a few years. But from a substantial point of view, which is much more important, it is necessary to emphasize to the contrary, that it is easier to accomplish unification between two countries, when unification can only be achieved at the price of modifications in existing legislative texts, when a large part of the more important changes that are to be made have already been adopted unilaterally in one of the two countries. This is what has occurred in the book of obligations of the new Italian Civil Code.

It is not necessary to describe at length the contents of the project of the Italo-French Code of Obligations, which are well-known. It is clear that, in any complex legislative undertaking, there are certain principles, certain tendencies, and especially certain norms, by which it is characterized; these appear—metaphorically speaking—on the face of the code, as do the physiognomic features on the face of a person, which reveal heredity.

What then are the symptomatic norms that constitute the physiognomic features of the Italo-French project? These are not difficult to indicate: recognition of a general action of rescission on account of "lesion" in contracts (art. 22); a generalized action of unjust enrichment (art. 73); enlargement of liability on account of illegal acts, including cases in which the subjective element of fault is absent (art. 76 *et seq.*); repression of "abusive" exercise of rights (art. 74); thus, an entire series of norms the greater part of which are designed to replace the generic recourse to

equity that took place in the courts—especially in France—by a precise, express legislative provision; all in propositions for the most part broad and generic, so as to authorize the judge (and this is the reform in method) to give them precise content in each case, with a breadth of discretionary evaluation which would have stupefied our ancestors, but which has precedents in other modern legislations, a trend in which one may perceive the fruits of the philosophy of a great French jurist, François Gény.

Now then, even if the systematic structure of the subject matter (which has purely formal value) is changed (for the worse) in the Italian Code, these physiognomic traits—to continue the metaphor—will be found in the Italian Code of 1942, and reveal the clear affiliation of the Italo-French project. Articles 1448 and following, provide a remedy for rescission on account of lesion (and if the Italian text, abandoning the concept of lesion as a vice in consent as in the project, accepts that of lesion as abuse of necessitous condition, the French *Commission de Réforme* follows the same path); article 1467 establishes the possibility of rescission in case of excessive burden; article 2041 introduces the action of enrichment; article 833 represses abusive exercise of rights, at least in the form of competitive exercise of the right of property; article 1815 declares the nullity of usurious interest, complementing the penal sanction of usury established by article 644 of the Penal Code; and the general principle of liability is enlarged by recognition of the cases of liability without fault (articles 2047, 2059 of the Civil Code).

And along with these more notable reforms, how many others, already introduced in the French-Italian project, appear in the Italian Civil Code of 1942 as accomplished legislative achievements. The obsolete category of quasi delicts disappears from the sources of obligations (art. 1173); delicts and quasi delicts are combined under the common head of illegal acts (arts. 2043 *et seq.*—project, arts. 73 *et seq.*); unilateral promises appear among the sources of obligations (art. 1897—project, art. 60); the *actio ad exhibendum* of the Italo-French (project art. 86) is recognized by the new Italian Code of Civil Procedure (art. 210); the principle is established that payment of a sum certain in foreign money is made at the rate of exchange on the day of payment (art. 1278—project, art. 24); the validity of a promise to contract, or preliminary contract, is recognized (art. 2932—project, art. 25), as well as the promise of a reward made to the public (art. 1989—project, art. 4); action of recovery is excluded in the case of an obligation contrary to *bonos mores*, if there was a violation of *bonos mores* by the payor (art. 2035—project, art. 27); the validity of a contract in favor of a third party has been extended to all cases in which the stipulating party himself has some material or moral interest (art.

1411—project, art. 45); the principle according to which, between the parties, in case of simulation, *plus valet quod agitur quam quod simulate concipitur*, is clearly affirmed (art. 1414—project, art. 49); the principle is recognized, that rescission for nonperformance is not available when nonperformance has little importance (art. 1455—project, art. 48); liability for damages to one who has acted under conditions of lawful defense is expressly excluded (art. 2044—project, art. 77); the right to reparation to one who has been injured by a person without discernment, is equitably affirmed when the economic conditions of the two parties involve disparity, rendering the damage suffered by the injured party greater than that suffered by the party liable (art. 2047—project, art. 76). And there also appears in the Italian Code of 1942, a declaration of illegality of the *pactum de dolo non prestando* (art. 1229—project, art. 105); judicial authorization to reduce an exorbitant penal bond stipulated for the case of nonperformance of an obligation (art. 1384—project, art. 166); reduction to ten years of the period of normal prescription (art. 2946—project, art. 249); recognition of the possibility of instruments of credit outside of those traditionally recognized in commerce (arts. 1992 *et seq.*—project, arts. 266 *et seq.*); the validity of the clause of reservation of title until payment of the price, with judicial authority to relieve the possible excessive burden of a clause authorizing the vendor to retain installments paid as indemnity (art. 1526—project, art. 331); the introduction, alongside of the category of the real contract of loan for consumption completed by delivery, of the category of consensual contract in case of an undertaking to open credit (art. 1482—project, art. 66).

And I would also add that, from a general point of view, it is not possible in fact to regard the Italian Code of 1942 (and he who speaks to you can not be suspect in this connection) as influenced by political considerations, nor, from a technical viewpoint is it doubtful that this is a real Latin code—even if it should be added that such a characterization is difficult to make with propriety and assurance. Contrary to the classification of legal systems proposed by Professor David, it seems inappropriate to distinguish sharply, on the one side, the existing French law from modern German and Swiss law, on the other, since from a more general point of view these two are undoubtedly neo-Latin or neo-Roman laws, products of the influence of the Roman common law, which for centuries prevailed in the entire territory of Germany, but never embraced all the provinces of France before the Napoleonic codification. Hence, it is not strange that, countering the influence of the *droit coutumier*, there was, however limited, a certain Germanistic influence on the Napoleonic codification, an influence which sometimes penetrated our codes before

unification and that of 1865, (as in connection with legal servitudes), and sometimes did not penetrate (as in connection with property relations of spouses) on account of the tenacious survival of the tradition of Roman law in Italy. But to avoid a discussion which might lead far afield, it may be stated in conclusion only that, as the systematic structure and general theories have decisive importance in uniform legislation concerning obligations and contracts, a unification of the Latin laws respecting obligations would be readily available to other peoples, who derive their law of obligations from the pandects of Brinz, Arndts, and Windscheid.

From another point of view, doubts have been expressed with regard to the appropriateness of renewing the old program of a uniform law of obligations for France and Italy. It has been said that, rather than unification of the general law of obligations, a unification on a wider territorial base of the provisions governing certain relations or institutions would be useful and even urgent and necessary: the bill of exchange is given as an example; international sale of goods carried by sea, insurance, transportation, might constitute further examples. But to this proposal also, response does not seem difficult. It is clear, in the realm of uniform legislation, that territorial extension is in inverse proportion to the scope of the subject matter covered by the project. Unification on a very wide territorial basis is possible for limited problems presenting almost everywhere the same technical features, the solution of which is not affected, or is little affected, by national tradition. On this account, a unification covering the entire field of obligations is possible for Italy and France and certain other countries related in tradition or culture, but it would be inappropriate for other countries. Nevertheless, one should take account of the fact that, among peoples where law traditionally is not regarded with exclusive empiricism, legislative reform of individual institutions would scarcely be accepted and fruitful, if they do not strike roots in the soil of a more general and also common system of ideas. Otherwise, one would run the risk of having to create a general theory of obligations for the purposes of transportation or insurance contracts. Nor would uniform provisions for insurance, transport, or sale, remain equally uniform in their application by the courts of the two countries, if there were no common basis of legislation respecting obligations in general and contracts.

It is also said that, while a project of uniform legislation respecting obligations would probably remain a doctrinal achievement, it would nevertheless be worth the effort. We may believe that our ambition can well be more than this. Naturally, in our discussions, the problem can be considered only on a theoretical plane, but there is good reason to hope

that, as occurred twenty-five years ago, private initiative may prepare the way for official action and finally receive the benediction of official participation by the governments. It is not possible to share the opinion that projects of this kind are not practically attainable. The masters who initiated this program—for Italy I think of M. Scialoja—did not have the reputation of being visionaries or individuals without practical sense; I will add that today we are all of us far more accustomed to radical reform, to drastic legislative intervention, even to assertions of external or superior limits to the sovereignty of the state; consequently, the difficulty and the obstacles should seem to us less serious.

Others, finally, although desiring legislative unification, point out that past experience serves to temper hopes, since the unity of the law is inevitably followed by a multiplicity of interpretations, on which account persistent co-operation in the sphere of jurisprudence is advocated. This is a subject extremely delicate and difficult. Unification and differentiation are two opposed alternating forces, which manifest themselves in the life of law as it were with a kind of inevitability. The reception of the *ratio scripta*, much more than the conquests, substituted the common law for the plurality of pre-existing laws, but the common law is fragmented among the national legislations, so that unification, which does not exclude later differentiation, again occurs among various national laws. Should we then renounce the task or regard it as fruitless, simply because the results perhaps will not be definitive?

This now long discourse allows—or perhaps requires—the formulation of certain conclusions:

I. It seems superfluous to emphasize the value of uniform legislation in the field of obligations. The extension and the intensification of legal relations, particularly those of a commercial character, among the different peoples as a result of the economic and commercial integration of markets in the different countries, was a phenomenon which exhibited itself in an imposing manner before the war and which the war has rudely interrupted. But since the war and the economic and moral disintegration which it caused, international unity is again being reconstructed. However, from the technical point of view, it needs to be noted that, while, during the past century, it was primarily sought to create an international community in the legal field, through the adoption of conventional norms of international law, it is certain that the method of uniform legislation is that which resolves the problem in the best and most definitive manner.

II. If unification is not to be consigned to utopia, it must be attained only by degrees. In any legal system, there are three components: a

traditional ethnic element, a formal technical element, and an element imposed by the socio-economic conditions of the moment. The influence of one or another of these elements alternately dominates the diverse institutions. It is easy to confirm that the ethnic and traditional element is dominant in the law of the family; in relations affecting exchange, the influence of economic conditions and development controls. It is thus clear that the greatest difficulty for uniform legislation is presented in those areas in which the ethnic and traditional element makes its influence most felt; in such case, there is little hope to reach uniformity by legislation, even if limited to a small number of countries. Hence it was wise, in the French-Italian project, to exclude topics which, although related to the law of obligations, are naturally connected with areas in which the influence of different ethnic or cultural traditions is relatively tenacious: such as matrimonial agreements[5], emphyteusis (of agricultural and cultural interest[6]) obligations deriving from the will of the testator[7]. Certain differences have been retained in the two Italian and French texts, differences regarded as compatible with a single code; thus, Article 12 of the Italian text reproduces the elimination of incapacity of married women, in conformity with the Italian law of July 17, 1919, No. 1170.

Lesser difficulties appear where the technique of economic relations and the uniformity of their requirements are predominant; for this reason it has been possible to achieve uniform laws, even on a wide territorial basis, in the matter of instruments of credit, and such are to be desired for copyright, patents, maritime transport, and insurance.

In the field of obligations in general and contracts, uniform legislation is certainly possible, and not difficult in countries which are commonly derived from the system of Roman sources, and most especially, between Italy and France. The Italian reporters of the Franco-Italian project have already emphasized that, despite the numerous reforms introduced, there are no fundamental differences in the common bases of the law of obligations of the two countries. The reporters stated: "It would not have been possible for us to propose such (sc. radical innovations) since the legislative delegation granted to the Italian government declares that the fundamental rules of existing law must not be modified, but moreover, and this consideration applies to France, since the law of obligations is a most solid structure, erected on the basis of Roman law, which has

[5] *Cf.*, Relazione, lxxx.
[6] *Idem*, xlvi-xlvii.
[7] *Idem*, liv-lv.

without opposition or interruption governed the civilization of Europe even after the fall of the Empire."[8]

III. The experiment of the uniform Code of Obligations for France and Italy, as attempted in its time, did not succeed, but in spite of the exceptional difficulties, it nevertheless produced helpful results in the legislation of many countries, and especially in the reform of the Italian Civil Code. The reform of the Italian codes of 1942 and even the abolition of the Code of Commerce, instead of impeding, substantially facilitate the accomplishment of the result in view, on account of the adoption, which has already unilaterally occurred, of many of the principles included in the project of the French-Italian Code of Obligations.

Thus, if realization of the project of a uniform code of obligations for France and Italy again fails, its lack of success certainly is not to be attributed to insuperable difficulties of a theoretical or practical nature, but only to highly unfortunate political events, occurring before the task was completed. Even at the time, a voice was heard:

"Assuredly, it is not in this period of exacerbated nationalism that such an endeavor to unify law among the nations can succeed, but this period will have only a space of time; the peoples will undoubtedly return, under the compulsion of necessity, to more reasonable economic ideas, and on that day they will comprehend how immense a progress it would be to unify certain parts of their legal systems."

He who spoke these words on the very eve of that intensification of insane nationalism that fatally led to the second world war, was Henry Capitant[9]; may Heaven please that after the fearful experiences through which Europe has passed, we may hope to proceed with this high enterprise which the master envisaged in the distant future.

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[8] *Idem*, clxxxi.

[9] Preface to the Polish Code of Obligations, Paris, 1935, p. vii.

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ARTHUR NUSSBAUM

The Legal Status of Gold

I

The classical gold standard of old as it existed in the principal countries until 1914—in this country until 1933—was based on fundamental legal rules: gold could be freely produced, imported, coined in the mints, melted and exported; the gold coins were unlimited legal tender and paper money, if legal tender, had to be redeemable in gold coins. Hence, gold was the object of extensive legislation concerned primarily with legal powers of the individual. That legislation was municipal throughout. True, the classical gold standard had developed into an international institution and into one of outstanding significance, but its international status was achieved merely by voluntary co-operation under the leadership of the Bank of England. In our day the classical gold standard no longer exists. Gold is still the determinant in the principal monetary systems, but only through the financial operations of the monetary authorities (governments, central banks) which try to establish a lasting ratio between the value of their national monetary unit and the value of gold. The law may and ordinarily does prescribe the ratio which ought to be maintained by the authorities,[1] but basically this "gold standard by management" is no longer an institution of municipal law to the extent that the classical gold standard was. On the other hand, the "gold standard by management" has assumed a status in *international* law. We refer to the International Monetary Fund Agreement of 1943, in force since 1946, and especially to its "par-value" regulation.[2] According to this regulation, a par value is obligatory for all monetary units of the member states and "shall be expressed in terms of gold as a common denominator, or in terms of the United States' dollar of the weight and fineness in effect on July 1, 1944." That weight, according to the Gold Reserve Act,[3] is $15\frac{5}{21}$ grains of gold $\frac{9}{10}$ fine (corresponding to $35 for the ounce).[4] The language of

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[1] See Nussbaum, *Money in the Law, National and International* (1952)—cited hereafter as "*Money in the Law*"—p. 121.

[2] Art. IV, §1 of the Articles of Agreement of the International Monetary Fund (United Nations Monetary and Financial Conference, Final Act and Related Documents, U. S. Dept. of State, Publication No. 2187, Conference Series 55; 1944).

[3] Jan. 30, 1934, 48 Stat. 337, 31 U.S.C. 440.

[4] Gold Reserve Act, c. 6, §15; 31 U.S.C. 444.

the Agreement is not too clear there, as elsewhere. Seemingly, it offers no more than an alternative of expression—a verbal matter only; but the true meaning is undoubtedly that the "par values" should be related to the price of gold, supposing that price amounts to one dollar for $15\frac{5}{21}$ grains of gold $\frac{9}{10}$ fine. Consequently, international law has made gold the basis of currencies the world over, surpassing, thereby, the classical gold standard as well as its area; at the same time, the United States dollar has been elevated by international law to the status of a monetary master unit—a quality which the pound sterling never possessed at the time of its world leadership. That status of the dollar has been recognized in later international agreements, especially in the Peace Treaties ending World War II[5] and by the (Geneva) General Agreement on Tariffs and Trade of 1947;[6] it is, however, conditioned on the actual maintenance of the dollar's par value, which is made possible by the unequaled magnitude of the United States' gold holdings[7] and the Treasury's policy to buy and sell gold at par value for all legitimate purposes.[8]

The existence of a sterling area[9] is not at odds with the supreme position of the dollar. The legal significance of that area, which includes the Commonwealth countries (except Canada) as well as some minor oriental states, consists in preferences of exchange control and tariffs, and is based on common policies expressed in municipal regulations rather than in international covenants. Concerning gold, the members of the area follow ways of their own, as is evident in the case of South Africa;[10] the English government serves merely as a custodian and banker of the area's common gold (and dollar) stocks. But all this remains within the framework of the International Monetary Agreement and is therefore subordinated to and dependent on the dollar parity of $15\frac{5}{21}$ grains of gold $\frac{9}{10}$ fine.

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[5] Peace Treaty with Italy, Art. 74A(5); with Bulgaria, Art. 21(3); with Hungary, Art. 23(2); with Roumania, Art. 22(2). See also "Agreement on German External Debts" of Feb. 27, 1953, Germany No. 1 (1953) *Cmd.* 8781, Art. 13(a).

[6] Arts. II 6(a), VII 4(a). See United Nations Publications 1947 II 10, Vol. 1.

[7] On March 31, 1953 $22.5 billion as contrasted with $11.8 billion of the other countries excluding U.S.S.R., cf. U.S. Treasury, *Annual Report for Year Ended June 30, 1953*, p. 57. For an historical survey see, Kriz, "The International Gold and Dollar Movement, 1945–1953," Commercial and Financial Chronicle, November 19, 1953, 4, 36.

[8] *Annual Report*, supra n. 7, at 56, 596; 1952, 220, 389. As a result the U.S.A. is exempted from exchange control, International Fund Agreement, supra n. 2, Art. IV, §4(b), second sentence.

[9] R. T. Harrod, *The Pound Sterling* (Princeton University, *Essays in International Finance*, No. 13, 1952); Copland, *Problems of the Sterling Area* (same Essays, No. 17, 1953); see also Conan, *The Sterling Area* (1952); F. V. Mayer, *Britain, The Sterling Area and Europe* (1950), Bareau, *The Sterling Area* (2nd ed., 1954—concise and clear). In official English terminology (Exchange Control Act, 1947) the sterling area is called "scheduled territories."

[10] *Infra* p. 363.

Outside the sphere of the International Monetary Fund, an international regulation related to gold may be found in the arrangements of the Soviet Union with her satellites. Originally, the Bolshevists' monetary system, following the ideas of Marx, was based on the theory that the monetary unit (ruble) need not be linked to gold but should be built on the amount of labor employed in the production of goods; but this system was abandoned by the Soviet Union as early as 1922,[11] when through a new "gold ruble" a formal connection with gold was established. The underlying gold ratio was always problematical since the Soviets never permitted a free trade which would have allowed a measure of the value of the ruble in terms of gold. In 1937 the ruble parity was fixed on a dollar basis,[12] but in 1950 a new gold basis (gold standard), conspicuously independent of the gold-dollar ratio, was created by the Soviet Union.[13] Apparently the satellite currencies have been linked to the new unit in a way which bestows upon the ruble in the communist world a leadership comparable to that of the dollar.[14] The predominance of the ruble is even stronger because of the dictatorial position of the Soviet government. On the other hand, that predominance is not tested as to its actual gold value by international trade and finance. Its relation to gold is nominal only, at least in the international area.

II

The preceding outline of the status of gold in the monetary systems might serve as an introduction to the more complicated and juridically more significant problems connected with the acquisition and disposition of gold by private individuals. While the provisions of the International Monetary Agreement are addressed to members only, Art. IV, Sec. 4 obligates every member "to collaborate with the Fund to promote exchange stability and to avoid competitive exchange alterations" and further "to promote within its territories exchange transactions between its currency and the currencies of other members only within the limits prescribed under Section 3 of this Article." (For "spot" exchange transactions—the usual type—the limits are one per cent above

[11] Cf. Hubbard, *Soviet Money and Finance* (1936) 125.

[12] See *Money in the Law* 243; Bettelheim, "La Réforme monétaire Soviétique," *Revue Economique*, 1950, 341.

[13] Zauberman, "Gold in Soviet economic theory and policies," *Amer. Econ. Rev.*, XLI, 879 (1951).

[14] Regarding the Polish zloty, see Zauberman, *loc. cit.*, at 855. In May, 1953, the Czech krona was placed "on a gold basis," at a definite ratio to the ruble, but "not linked to the dollar, the money of a capitalist state and a country with potential economic crises," according to an official Prague announcement, *N. Y. Times*, May 31, 1953, p. 1.

and one per cent below parity.) There are good reasons to include gold transactions in the concept of "exchange transactions" or "foreign exchange dealings" (Sec. 3 uses both terms indiscriminately—the latter only in the headline). Morover, the language of the provisions quoted seems to favor the interpretation that the member states are in duty bound not to permit within their territories adverse transactions in foreign exchange or gold *by private individuals*. As a matter of fact, this view was originally taken by the Fund with the support of the United States and Great Britain.[15] However, the Fund met with counterforces which proved stronger. Countries, in whose trade balance the exporting of gold is an important factor, naturally favor premium prices for the exporting of gold. This was and is especially the position of the Malan government of South Africa, which showed little inclination to restrict such sales efficiently.[16] Canada, though otherwise more complacent, granted even subsidies to gold mines in order to stimulate such exports,[17] and these subsidies were unexpectedly increased by the Manitoba King's Bench and Court of Appeals which, over the opposition of the Manitoba Attorney General, held that the subsidies did not form part of the "income" taxable under the Manitoba Royalty and Tax Act.[18] In financial terms this must have amounted to a goodly increase of the bonus. (The incident is illustrative of the surprises which may affect international agreements with common law countries wherever the rights of individuals, including, of course, of corporations, are concerned.)

However, in South Africa and Canada free trading of gold is not permitted internally, and especially not with regard to gold coins; the controversy with the Fund involved merely the exportation of unminted gold. A much more sweeping and serious problem was presented by practices in France; there, an inveterate and indelible bent of the people

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[15] *International Monetary Fund, Annual Report* (hereafter cited as *Annual Report*), 1947, 78; 1948, 39.

[16] Cf. *Annual Report*, 1949, 63; 1950, 93. The Minister of Finance of the Union of South Africa, Mr. Havenga, made this remarkable statement on September 7, 1949: "The right of possessing gold is among the few which are left to us and which allows us to save from depreciation whatever the government permits us to keep of our profits." Transl. from *Annales d'Economie Politique* (Paris), V (1950), 72 n. 2.

[17] *Annual Report*, 1951, 74. On Southern Rhodesia and West Africa see Kriz, *The Price of Gold* (Princeton University, *Essays in International Finance*, No. 8, 1947), 7 n. 8.

[18] San Antonio Gold Mines Ltd. and Jeep Gold Mines Ltd., both versus Attorney General for Manitoba (1950) 4 D.L.R. 605; (1951) 3 D.L.R. 45, discussed by Goldman in *Canadian Bar Review*, XXIX (1951), 674, and Gold, "The Fund Agreement in the Courts—II," International Monetary Fund, *Staff Papers*, II (1952), 494 n. 24. The Canadian agreements with the Fund were disregarded by the Court on evidential considerations of a somewhat obscure nature.

for hoarding gold coins and other gold (a bent closely associated with an inveterate and indelible resistance to direct taxation)[19] frustrated all attempts by the French government to obtain control of private gold holdings. Hence, in February and March, 1948, the French government decided to establish at the Paris bourse a free gold market with the assurance of anonymity to the customers of the brokers.[20] Since that time, official quotations are made daily at the Paris bourse for the 20-franc gold coins which have remained unchanged in size and gold contents since the creation of the franc by the law of 17 Germinal of the Year XI (April 7, 1803). (They are commonly called "Napoleons" after their initial effigy.)[21] In addition, there are official quotations for bars and lingots of gold.[22] "*L'or avait vaincu l'Administration.*"[23]

The opening of the free Paris gold market led to an open conflict between the Fund and the French government,[24] but the Fund, confronted also with the resistance of the gold-producing countries, had finally to yield. By a statement of September 28, 1951,[25] it abandoned its attempts to control the gold trade; more specifically, the Fund left it to the discretion of the respective governments to decide to what extent gold may be bought and sold in variance with par values—an inescapable decision, I believe.[26] As a result, the par value was abandoned by France, and the same was done for one reason or another by Canada, Nationalist China, Greece, Italy, Jordan, Thailand, and Uruguay.[27] And of course, private traders are not bound by par values in countries which have not joined the Fund.[28]

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[19] 83rd Cong., 1st Sess., Senate Report of the Investigations Division, Foreign Aid Program in Europe, July, 1953 (35516), p. 14.

[20] Sédillot, *Le Franc, Histoire d'une Monnaie* (1953) 356 ff.

[21] The French call this type of coin "coq" because they show the stamp of the Gallic cock. Sédillot, *op. cit.*, 358.

[22] More on this by Digne, "Quelques aspects actuels de la question de l'or," *Annales d'Economie Politique*, V (1950), 59.

[23] Sédillot 357. However, the Tripartite Monetary Agreement of September, 1936 (*Money in the Law* 511) being still in force, the Treasury freely sells gold to the Banque de France at par value. This led to a controversy because the Banque de France was charged by the United States and Great Britain with having accepted premium prices for dollars in the sale of gold. *N. Y. Times*, Jan. 25, 1951, Sec. 3, p. 35. There is no official statement on this matter.

[24] *Money in the Law* 535, 546.

[25] *Annual Report*, 1952, 95.

[26] In *Money in the Law* 536, I stated that the Fund hardly had the power to withstand the pressure of the gold market.

[27] *Annual Report*, 1953, 146.

[28] Among these countries Switzerland takes the first place. However, Swiss policies are very conservative. A parity of the Swiss franc conforming to the dollar parity was established by the law of April 20, 1953, *Bundesgesetzblatt*, 1953, 209, but gold trade is restricted by the requirement of import and export licenses and, until recently, by a sales tax, *infra* n. 91.

The par-value policies of the Fund have, however, been strictly upheld by the United States and Great Britain. In the United States the situation was relatively simple, owing to the successful "nationalization" of gold coins and gold bullion carried through by the Roosevelt administration under the Gold Reserve Act of January 30, 1934. That nationalization was facilitated by the fact that hoarding had largely been done through gold certificates. However, gold coins were by no means overlooked by the hoarders. But the American people showed themselves willing to surrender their gold to the government and to do this in peacetime—an admirable achievement indeed. As a result, this country's gold treasures can be fully exploited for the benefit of the whole nation, contributing thereby to the power of the United States and to the economic stabilization of the Western World—a situation illustrated by the counter-example of France whose private gold hoarding, estimated at 3 to 4 billion dollars, operates only in weakening and discrediting the nation.[29] It may be added that gold held in this country by foreign residents had likewise to be surrendered to the government,[30] but this factor was not of great significance.

The rights and duties of the individuals with regard to gold[31] are determined by the Gold Reserve Act and more specifically by the Treasury's Gold Regulations of August 29, 1952,[32] which are based on the Act and have replaced earlier regulations of the same kind.[33] Accordingly, gold can be acquired, held, transported, imported, and exported in this country as a rule only under a government license; the penalties provided for contraventions being heavy and including the forfeiture of the gold.[34] Use of newly mined or imported gold for industrial, professional, and artistic purposes does not require a license, but is subject to other strict regulations.[35] In contrast, gold in any form situated outside the United States

[29] See, *e.g.*, Sédillot, *loc. cit.*, 370; Digne, *supra* n. 65; Pick, *Black Market Yearbook*, I (1952), 102; F. Drucker, in *Harper's* Aug. 1, 1953, 49. The recent decrease of the gold price has probably reduced the size and value of the hoardings.

[30] See British-American Tobacco Co., Ltd. v. Federal Reserve Bank of New York, 104 F. 2d 652, 105 F. 2d 935 (C.C.A., 2d, 1939), *cert. denied*, 308 U.S. 600, 639; and 37 Op. Att. Gen. 155 (1933).

[31] On gold certificates see *infra* n. 93.

[32] *Fed. Reg.* (1952) 7888 (amendments pp. 8039, 13345).

[33] Gold Regulations (1948), 31 Code Fed. Reg. 54; for the earlier period cf. *Money in the Law* 598 n. 23.

[34] Pick, *supra* n. 29, at II, 109, reporting on the New York black market, asserts that the "trading in gold coin was rather quiet in 1952, and averaged [daily] about 300 to 400 Double Eagles against more than 5000 daily during the war years." It sounds strange.

[35] Gold Regulations §54.21. Pick, at I, 107, calls Manhattan's "transit gold market" "a completely legal phase of dealings in the yellow metal." This reads as though trading in transit gold is entirely free. Still it is legal only inasmuch as it is done under government supervision. Gold Regulations §54.33. In 1954, the handling of the provision was somewhat relaxed.

may be acquired or held by any citizen or resident of this country for foreign or domestic account. This opens the door for trading with gold, including gold coins within the United States, provided the gold remains abroad.[36] Surprisingly, Americans utilizing this opportunity are under no obligation to observe any par values and they need not even keep records on their gold transactions. This more than liberal regulation has been extended to places under the jurisdiction but outside the "continental boundaries" of the United States, such as Puerto Rico, Hawaii, Guam, etc.; only United States gold coins are excluded from this special favor which is also confined to persons not domiciled in the "continental" United States.[37] Still, there is little doubt that the confiscatory regulations of the Gold Reserve Act may legally be extended (1) to all places under the jurisdiction of the United States as well as (2) to gold held by American citizens not residents of the United States.

Regarding (1), the power of the Treasury follows from the text of the Gold Reserve Act itself which leaves to the discretion of the Secretary of the Treasury gold regulations for places within United States jurisdiction though outside "continental" boundaries.[38] Regarding (2), Congress has power under the Constitution to require American citizens (and probably even American residents) to surrender their gold held abroad to the American Government.[39] So far, however, nothing has become known about government plans in the one or the other direction.

The English regulations, based on the Exchange Control Act, 1947,[40] present a somewhat different picture. Any resident of the United Kingdom has to offer to the Treasury gold which he is entitled to sell—a provision taken from earlier enactments which had led to the confiscation effected more gradually than by the American Gold Reserve Act. On the other hand, the range of the English regulation is broader. While the American enactment is confined to gold coins and gold bullion, the English Treasury may require the surrender of any gold[41]—vessels, chains, etc. All this ap-

[36] Ex-King Farouk of Egypt is said to have been an "avid buyer of the wares of American dealers in gold coin." Bratter, "May Americans hoard gold coins?" in *Commercial and Financial Chronicle*, Oct. 2, 1952, p. 33. Egypt had then already joined the International Monetary Fund. Hence the Fund's Administration, but its wise decision of September 28, 1951, *supra* n. 17, has also escaped the problem whether the "par value" regulations must be enforced against sovereign rulers.

[37] Gold Regulations §54.14, 54.15, and 54.4 [definitions] (3) and (4).

[38] Gold Reserve Act §3; 31 U.S.C. §442.

[39] The basic principles have been laid down in Blackmer v. U.S., 284 U.S. 421 (1932); see also the tax case U.S. v. Bennett, 232 U.S. 299 (1914) and Cook v. Tait, 265 U.S. 47 (1924).

[40] 10 & 11 GEO. VI, c. 14, Part I. See Mann, "The Exchange Control Act, 1947," 10 *Mod. L. Rev.* 411 (1947).

[41] Exchange Control Act 1(1).

plies also to gold held abroad, and no English resident is permitted to buy, borrow, sell, or lend gold outside the United Kingdom except under conditions determined by the Treasury.[42] On the other hand, the English regulation is not so sweeping in one important matter. Contrary to American law, gold held in England by foreign residents need not be surrendered to the authorities. London has, therefore, remained an important repository of foreign gold. For the handling of this gold, the Bank of England and a few outstanding private banking firms have been appointed "authorized dealers" by the Treasury.[43] While always subject to the Treasury's control, they enjoy considerable latitude; but they are not allowed to trade gold at premium prices,[44] and every exportation of gold, even if done by an authorized dealer, requires a license.[45] Still London has preserved at least a remnant of its former prominence in the gold market. Recently, the London gold market has been reopened with much solemnity, but it seems without a change in the Exchange Control Act;[46] only the practice of the Bank of England, acting as representative of the Treasury, has been relaxed. The obligation of the United States to maintain the official gold rate provides a kind of insurance to the new market.

III

Far greater legal problems are raised by the "free" gold markets. Among them Paris is the most important.[47] Within the area of the International Monetary Fund, Montevideo and Cairo have free gold markets too, and many more such markets are found outside the Fund area, particularly in Hong Kong, Bombay, and Tangier. Coins are the main objects of these markets. They offer the hoarders many advantages over gold bars (ingots): they represent much smaller values accessible to less moneyed people such as peasants; they require no assay certificates; they can more easily be hidden; and they are far more attractive and may have a sentimental value, as the Napoleons or Louis d'or have for the French. Coins, therefore, enjoy a considerable premium, mostly of 30 to 40 per cent over gold bullion. Trends in the various markets differ. Prices have always been

[42] So far as I could ascertain, pertinent regulations have not been publicized by the Treasury.

[43] The Exchange Control (Authorized Dealers) Order, 1947, no. 2071, S.R. & O., VI, 1016.

[44] *Annual Report*, 1948, 41.

[45] Exchange Control Act 22 I(d).

[46] International Monetary Fund, *International News Survey* II (1954) 296; New York Times, March 23, 1954 (Financial; Report by Reuter, London).

[47] See *supra* n. 20. Pick, *supra* n. 29, at I, 4, severely criticizes the government restricting the "freedom" of "capital transfer and private gold possessions." At I, 109, he mentions the only country where the "gold coin standard" is still functioning. It is Saudi Arabia.

high in the Near East which, despite its general poverty, has always been the scene of displaying as well as of hoarding gold by those powerful enough to get hold of it.

Under these circumstances, it is hardly possible to determine the market value of gold as existing at a definite date. This difficulty may assume considerable legal significance in the case of "gold clauses" embodied in contracts, wills,[48] international treaties, etc. Such clauses are not invalid everywhere[49] as they are in this country under the Joint Resolution of June 5, 1933. Supposing the clause is valid under the applicable law, the problem of the gold value involved will necessarily arise.[50] Courts of countries associated with the International Monetary Fund will probably apply the official "par value." Decisions directly in point are not yet available, but a few cases are at least somewhat connected with this matter. In the first place, we refer to a decision rendered in May, 1947, by the Appellate Court of Alexandria, highest among the now defunct Egyptian Mixed Tribunals.[51] The court was confronted with bonds of the Suez Canal Company, payable on the basis of the "Germinal" franc of 1803, that is, on a gold basis,[52] in the respective currencies of the countries where the bonds had been floated. The court converted the "Germinals" into dollars according to the gold content of the "Germinal" as compared with that of the dollar; the dollar amount was then reduced to Egyptian

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[48] App. Brussels, Jan. 31, 1951, *Semaine juridique*, 1951, II, 6187, with informative annotation by Professor Piret. The court held the gold clause valid.

In Matter of Heck, 203 Misc. 788, 116 N.Y.S. (2d) 255 (Surr. Ct. N.Y., 1952) deals with a legacy in "gold marks," taking, however, the reference to "gold" as irrelevant. (See *Money in the Law* 243 on "sham gold clauses"). The facts stated do not allow the conclusion that the court's interpretation of the term was correct. In no event is this a "gold clause" case.

[49] A comparative survey of the judicial and legislative restrictions of the gold clauses is given in *Money in the Law*, §§18 and 19. Italian invalidation of gold clauses has meanwhile been confined to contracts entered into before October 1, 1947: Corte di Cassazione, July 29, 1950, *Foro Italiano*, 1950, I, 993: cf. also Ascarelli, "Sulla efficacia delle clausula oro," *ibid.*, 1951, IV, 9. Belgian courts, too, now seem to uphold gold clauses again, *supra* n. 48. On the other hand, the Supreme Court of Chile, in 1949, has reaffirmed the invalidity of the clauses. *Revista de Derecho* (Concepcion, Chile), XVI, 509 ff., summarized by Gold, "The Fund Agreement in the Courts," *Staff Papers* (International Monetary Fund), I (1950), 321 n. 21.

The London Agreement on German External Debts of Feb. 27, 1953, Cmd. 8781 (now ratified), Art. XII, converts the gold clauses entered into by German debtors before May 8, 1945, to all intents and purposes, into dollar clauses.

[50] Judicial use of unofficial or even "black" market prices sometimes occurs. See Belgian Cass., Aug. 5, 1942; March 13 and 25, 1943, *Pasicrisie Belge*, 1942, I, 779; 1943, I, 98, 110, and Piret, *supra* n. 48, at IV.

[51] Hoirs-Setton et autres v. Compagnie Universelle du Canal Maritime Suez, May 17, 1947, *Journal des Tribunaux Mixtes*, 1947, n. 3772.

[52] The Germinal franc was originally defined bimetallistically, namely in terms of gold as well as silver, but the silver rate was abandoned in 1876, Sédillot 215.

pounds according to the market rate for dollars, as it prevailed on the Cairo bourse at the time of the maturity of the bonds. The "par value" of the international Monetary Fund was not applied because the litigated facts had arisen before the Fund Agreement became effective. But the opinion is significant because the court based the conversion of the "Germinal" on the rate of the dollar which had neither directly nor indirectly been referred to in the bonds; obviously the court considered the dollar as the universally accepted monetary yardstick. The court reversed thereby the decision of the lower court which had granted to the bondholders the gold price of the Cairo market which, though not expressly stated in the opinion, was probably much higher and would have imposed an unfair burden upon the Suez Company.

The Paris gold prices of the "Germinal" were not mentioned in either opinion, perhaps because they were "unofficial" in 1947. Nevertheless, the gold price paid by the Banque de France in 1945 was passingly referred to in another Egyptian case[53] which was concerned with bonds issued by the Land Bank of Egypt in terms of the 1928 (Poincaré) franc, and maturing in 1945 when the franc had depreciated further. The court determined the equivalent of the francs due (the judgment had to be given in terms of the Egyptian pounds) according to the official devaluation inflicted upon the franc since 1928 in terms of legal gold parity, whereas the actual depreciation of the franc had been much larger. The Bank had offered instead a settlement on the basis of the price paid for gold in 1945 by the Banque de France. This offer was considered by the court to be more favorable to the bondholders than the court's own theory. The details of the opinion lack general interest, but the case is significant because it indicates that wherever a currency involved in a lawsuit has depreciated the question of gold value might be raised. It should also be noted that the purely Egyptian court refrained from resorting to the Cairo gold prices.

Far more than by these two cases, the legal significance of the local gold prices is indicated by the French bonds emitted in 1952 through the Pinay cabinet on legislative authorization.[54] Payable in French francs, they carry a guarantee against depreciation in terms of the Paris quotations of gold coins (Napoleons). The amount payable to bondholders on interest or capital will be fixed by the Minister of Finance each May 15 and November 15 according to the quotations recorded in the preceding one

[53] Setton et autres v. Land Bank of Egypt, Trib. civ. Alexandria, April 14, 1949, *Journal des Tribunaux Mixtes*, 1949, n. 4078.

[54] Law No. 52–565 of May 21, 1952, *Journal Officiel*, 1952, 5113; Decree of May 26, 1952, *ibid.*, 5328, Art 5, par. 2; *Bulletin Législatif Dalloz*, 1952, pp. 356, 361, 364, 391.

hundred bourse days. Such an undertaking is certainly in discord with French tradition. As early as the 16th Century the great French jurist, Charles Dumoulin (Molinaeus), taught that every member of the community has inevitably to bear the consequences of a common disaster, such as the depreciation of the legally and actually adopted currency.[55] In the same spirit the French courts, at variance with non-French judiciaries, have invariably denounced and nullified gold clauses in inter-French relations.[56]

Of course, the legislative is above the courts, and especially so in France, but the deviation of the Pinay loan from an old and noble tradition does not augur well. Never have gold clauses withstood the pressure of strongly adverse monetary developments.[57] The government as a debtor will then find itself even in a worse situation than a private corporation which might increase sale prices and thereby its receivables; the government certainly cannot impose anything like gold clauses upon the taxpayers. However, the government will have another weapon, namely that of obtaining relief through legislative measures abolishing or reducing the "gold" obligations. And even leaving aside such intervention, one has to bear in mind that in the case of a war or other grave political disturbance the Paris gold trade—precarious anyhow—may be shattered and even discontinued. In 1922, when confronted with an analogous situation, the Italian Corte di Cassazione decided in a gold clause case that the last quotation preceding the discontinuance of the official gold market should be used in the determination of the gold value so as to disregard the heavy later depreciation of the lira.[58] Legal action against the French Government would offer little chance as the Government might invoke its immunity, as it did in 1937 when it actually relied on the invalidation by the Joint Resolution of the gold clauses in its American loans.[59]

IV

The craving for gold coins has given rise to a strange phenomenon. A new type of industry has arisen during the last few years—manufacture, public and private, of gold coins which look like renowned earlier types and actually hold their authentic gold content. Napoleons, English

[55] *Money in the Law* 267.

[56] *Ibid.*, 262.

[57] No further instance of gold clauses in bonds or other important documents of the period following World War II has become known. In Sweden a prominent corporation (Kooperative Förbund) has recently resorted in a bond issue to an index clause covering, however, depreciation only up to 50 per cent. *N. Y. Times*, Jan. 20, 1952, (III, 1).

[58] *Money in the Law* 261.

[59] *Ibid.*, 274 n. 59.

sovereigns, and Mexican pesos have been the main output of this industry.[60] Great central banks participate to some extent in this endeavor by minting gold coins, long out of circulation and far exceeding their nominal value. This has been done, e. g., by the Bank of England and the Banque de France which issued 20-francs gold coins of the demonetized type showing year-dates of a happier past.[61] Even the Soviets have apparently aided the hoarding practices of the Western capitalists by manufacturing and exporting Austrian and other gold coins of bygone times.[62]

Some juridicial reaction to these practices has already appeared. In France private fabrication of Napoleons has been held punishable not exactly as counterfeiting of coins but on other grounds (counterfeiting of marks claiming government authority).[63] Far more important and instructive is a decision of the Swiss Federal Tribunal dealing with the manufacture of English sovereigns and of the coin types mentioned above.[64] The manufacturers being Italians residing in Switzerland, the Italian Government had demanded from Switzerland their extradition on the basis of the multipartite Convention of April 20, 1929 for the Suppression of Counterfeiting of Currency[65] and also of a bipartite Italian-Swiss extradition treaty of June 22, 1868.[66] The court denied the extradition with the result that there is still no evidence of an actual operation of the 1929 Convention.[67] Juridically the arguments used by the Federal Tribunal are highly questionable. The court starts from the theory that the fabricated coins were not "*monnaie*" in the meaning of the 1929 Convention (the opinion written in Italian speaks of "*moneta*"),[68] but this view is based on a strange kind of reasoning. The court had to follow in this case the "state theory" of money which makes issuance by the state a

[60] In Tangier a private bank recently issued, quite lawfully it seems, a gold coin called "Hercules" [see *N. Y. Times*, April 15, 1953, (Financial) p. 49], a denomination which should not be taken as a sign of financial strength, but rather as a reference to the nearby "Pillars of Hercules" at the Strait of Gibraltar.

[61] Sédillot, *op. cit.*, at 350. By selling the coins to hoarders the bank profited from the premium of the coins. see Int. Monetary Fund, *Int. Financial News Survey*, VI (1954) 222.

[62] See the list *infra* n. 84. On recent "Hungarian" sales of gold see Pick, *supra* n. 29, at II, 108.

[63] Trib. corr. d'Evreux, Nov. 15, 1951, *Recueil Dalloz*, 1951, 734. Among other things, the counterfeiters possessed matrixes for the effigy of Louis XV, monarch of the "Louis d'or."

[64] Swiss Federal Tribunal, July 16, 1952, *Entscheidungen des Schweizerischen Bundesgerichts*, 78 (I), 225 [Italian text; German translation in *Praxis des Bundesgerichts*, 41 (1952), 502].

[65] League of Nations, Treaty Series CXII, 372, 377, Art. III; *Money in the Law* 323. The text is in English and French.

[66] *Raccolta Ufficiale delle Leggi e dei Decreti del Regno d'Italia*, 1869, 679.

[67] *Money in the Law* 323.

[68] The text of the Convention is in French and English.

criterion of money, and which was implied by the Convention of 1929 through the requirement (Art. 2) that the "circulation" of the currency in question must be legally authorized.[69] But in addition the court held that the quality of being legal tender constitutes another prerequisite of "money". It declared this theory to be "obvious." In reality there have always been moneys lacking the quality of legal tender; in this country, it will suffice to point to the state bank notes before and the national bank notes after the Civil War;[70] and since the court had to do also with English money, the notes of the Bank of England offer a striking instance to the contrary since they were made legal tender only in 1833 after having circulated as money for more than a century.[71] Moreover, the English text of the Convention, which was not examined by the court, speaks not of "money" but of "currency"—a term denoting actual circulation. The error led the court into a hopeless impasse in the case of the counterfeited English sovereigns. The legal tender quality of the sovereign[72] had never been repealed. This is in accord with English tradition. During the Napoleonic Wars as well as after World War I, the pound sterling depreciated so heavily as to drive the sovereign for years out of circulation, but the authorities never thought of divesting it of its legal tender quality. Similarly, since 1931 when the decline of the pound sterling began, the necessary countermeasures, such as exchange-control and the establishment of a stabilization fund, were taken. But why emphasize the disaster by disgracing the sovereign? Hence, under the theory of the court, the sovereign should have been classified as "money" and extradition should have been granted. In order to escape that conclusion, the court took pains to explain at length that the "gold sterling is ordinarily (*sic*) traded above its past legal rate"; alleging some official statements,[73] the court found itself "prompted to assume such a state of things"—certainly not a daring statement, considering that the £ has been reduced to a fraction of its original gold value! On this basis then the court denied the money quality of the sovereign in order to disallow the extradition. What the court really did was to employ the "societary" theory of money, which places the emphasis upon the actual circulation of a coin or note at its nominal value within the community—a theory approved by American

[69] The French text speaks of "monnaie ayant cours en vertu d'une loi."

[70] *Money in the Law* 46.

[71] See, e.g., Feavearyear, *The Pound Sterling* (1931) 234.

[72] That quality had always been conditioned in several ways, hardly conforming to the court's theory. Coinage Act, 1870, 33 VICT., c. 10; Mann, *The Legal Aspects of Money* (2nd. ed. 1953) 34.

[73] Namely, to the effect that the Bank of England, too, pays more than the nominal value for sovereigns. Still, the Bank is under no *legal* obligation to do so.

courts[74] and consonant with the term "currency" as used in the English text of the Convention. In fact, the soundness of the societary theory is thus strikingly demonstrated: a distinguished court proclaims the state theory of money, but by sheer pressure of realities it is forced to rely on the societary theory in order to reach its desired result.

The final disposition of the case can be approved as far as the 1929 Convention goes. However, the outcome is more doubtful with regard to the Swiss-Italian extradition treaty of 1868. That treaty, phrased in German and French (not in Italian!) speaks of the counterfeiting of "*Münzen*" (coins) and "*Bankbillets*" (bank notes); though the French text uses the word "*monnaie*" for "*Münzen*", this means no difference since the French language has no specific term for "coin." In 1868 and many years after, currency conditions in Italy were utterly confused;[75] just as in this country during and after the colonial era, many foreign coins were in circulation. As late as 1882 the Italian Commercial Code (Art. 39) referred to money (*moneta*) promised in a contract, but having in Italy no "*corso legale or commerciale.*"[76] Reference is made thereby to money having in Italy merely a "commercial" circulation not based on Italian legislation. This refers to foreign coins (or banknotes) commonly used in Italy. Under such conditions, Italy in 1868 was interested also in protecting herself against counterfeiting of certain foreign coins—a situation suggesting a broad interpretation of the term "coins" as employed by the Treaty.

The ruling of the court seems to have encouraged the producers of full-bodied foreign coins.[77] It caused repercussions also in the legal field.[78] A lower Milan court, which had to deal with "unofficial minting of sovereigns in Italy," adopted the theory of the Swiss Tribunal that the sovereign was no longer legal tender and on this ground refused the punishment of the producers. The English Government felt that this decision would impose upon the Bank of England "considerable loss of income on its mining operations," considering the fact that the Bank employs the sovereigns in international arbitrage dealings.[79] On the request of the

[74] *Money in the Law* 9.

[75] I. Sachs, *L'Italie, ses Finances et son Développement Economique, 1839–1884* (Paris, 1885) 582 *et seq.*

[76] *Cf.* Ascarelli, *La Moneta* (1928) 69; Scaduto, *I debiti pecuniari e il deprezzamento monetario* (1924) 40 *et seq.*; Nussbaum, *Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts* (1925) 216. The same distinction is found in the Roumanian Commercial Code of 1887, Art. 41.

[77] Following the decision of the Federal Tribunal, advertisements of various "rare" gold coins struck in Austria made their appearance in Swiss newspapers. Bratter, *supra* n. 36 at 33.

[78] The following facts are taken from the *Bankers' Magazine* (London) Nov. 1953, p. 368.

[79] According to the *Bankers' Magazine*, the minting of sovereigns amounted in 1949 to 138,000 pieces.

English Government, the Italian Solicitor General has therefore taken an appeal against the decision. The Government relies on the theory that the sovereign is still legal tender under English law, at least in international relations, as the sovereign has been accepted by the foreign authorities. But, of course, these authorities were under no obligation to do so as required by the rule of legal tender, which moreover is related to the national rather than to the international area. The whole line of argument is highly questionable and remote from the continental doctrine of which the Italian concepts of "*corso legale*" and "*moneta*" form an integral part. Nevertheless, a lower Milan court seems to have accepted the English argument. Similar cases are said to be pending in Trieste, Turin, Tangier, and Zurich.[79a] The controversy certainly deserves the attention of all those interested in private international law and in monetary theory.

V

The production of the new gold coins presents legal problems to this country also. Under the Gold Reserve Act, gold held or imported into the United States must be delivered, in the absence of a special license, to the authorities at the rate of $35 for the ounce of gold 9/10 fine,[80] a compensation definitely unfavorable especially in the case of perfect-looking gold coins. No leeway is left for the private fabrication of gold coins, American or foreign. Still the Gold Regulations contain provisions, pertinent to our inquiry, on "rare coins." They permit the acquisition, holding, and importing, without license, of "gold coin of recognized special value to collectors of rare and unusual coin." However, the new industry has been taken care of by the further ruling that "gold coin of foreign issue made subsequent to April 5, 1933,[81] is presumed not to be of special value to collectors of rare and unusual coin;"[82] and a few months before the issuance of the new Regulations, the Bureau of Customs had advised the collectors of customs that "old foreign coins are being reproduced and new gold coins issued abroad in substantial quantities, indicating a number of gold coins not qualified for free importation."[83] A list was added by the Bureau in which Austrian coins are conspicuous.[84]

[79a] *Int. Financial News Survey*, VI (1953/54) 190, 253.

[80] Sec. 31 U.S. 0. 440, 444; Gold Regulations *supra* n. 33, §54.44.

[81] Gold Regulations, §54.20.

[82] Demonetization of gold coin started in this country by the Presidential Proclamation of April 5, 1933 and Exec. Order No. 6102, *Federal Reserve Bulletin* (1933) 213; *Money in the Law* 598 n. 23.

[83] Circular Letter No. 2798 of June 25, 1952, which is freely distributed by the Treasury Department.

[84] The list reads as follows:

Albania	100 franka	1926–27
Austria	1 Dukat	1915

Despite all this, it has been asserted in a noted periodical that gold coins, old or new, may be hoarded by Americans[85] because there is "no way to determine who is a bona fide collector." Yet one does not see why the qualification of such a "collector" should be an impossible or even a particularly difficult task.[86] Moreover, what matters is not so much the qualification of the individual alleged to be a "collector" but the fact whether the coins are "recognized as having special value"—a numismatic question for the solution of which there are sufficient experts available. The result is therefore—Americans may *not* hoard gold coins in this country.

Regarding gold held by Americans abroad, it has been pointed out above that Congress has the power to order the surrender of such holdings. The sovereign of the place where the gold is held likewise has such power which under international law takes precedence over government seizure based merely on citizenship.[87] Generally speaking, there can be little doubt that in the case of an emergency, and particularly of a war, governments will interfere with gold deposits. We remember that even in this country the confiscation of gold was extended to gold held here by foreigners.

Nevertheless, in most countries persons will be found who, disregarding these and other dangers, tend to hoard gold in foreign countries not only in the hope of securing thereby an ultimate resource in the case of an extreme emergency but, even more, in order to evade taxes. Americans have participated in these transactions apparently only to a relatively small extent[88] (perhaps because we have no general taxes on personal property), but the universal desire for hoarding has been strong enough to have produced a strange international phenomenon: the establishment of exotic banking institutions designed for the storage of gold. In Tangier,

	4	Dukat	1915
	20	Corona	1915
	100	Corona	1903–14–15
	100	Kronen	1923–24
	20	francs (8 florins)	1923–24
France	20	francs	1901–1921
Hungary	100	Korona	1907–08
Peru	20	Sol	1950 and subsequent years
	50	Sol	1950 and subsequent years
	100	Sol	1950 and subsequent years

[85] *Supra* n. 36

[86] The author of the article under discussion even tells us: "You may have no more than a few coins left over from your European trip and claim to be a collector."

[87] See, *e.g.*, Oppenheim, *International Law*, I (7th ed., 1948) 620.

[88] Pick, *loc. cit.*, at I, 102; II, 109.

the Société de Banque Tangéro Suisse has been established—in 1949, it seems—by a reputable Swiss bank specifically for deposits of gold coins or gold bars on the basis of carefully elaborated contract terms.[89] Among other facilities, the bank offers "*certificats d'or*" or "*Goldzertificate*" to the depositors. These certificates may be issued in the holder's name or, in order to secure perfect anonymity, to bearer; in the first case they are freely endorsable. The whole arrangement is subject exclusively to the law of Tangier and the jurisdiction of the Tangier courts. It raises many problems, for instance, with regard to the effect of endorsements of the gold certificates or the legal position of the holder in the case of a bankruptcy of the depositary bank.[90] With regard to the first question, the bank, under the terms referred to, is entitled, though not obligated, to examine the correctness of an endorsement and in the case of a negative result to refuse the delivery of the gold to the endorsee. This might or might not work out satisfactorily. Even more disturbing, the gold is held by the bank as "*entrepôt fictive*," that is, as a transit commodity not subject to the customs which amount to 7½ per cent and are due whenever the depositor wants to "import" the gold. Hence, the question arises of how long the customs authorities will allow the exemption on the basis of the fictional "transit" theory. However, by depositing the gold in Tangier, Swiss depositors apparently escape the 4 per cent sales tax laid by Switzerland on sales of gold.[91]

The Tangier enterprise must have had some success, because Uruguay decided to copy it.[92] On August 11, 1952, a Uruguayan decree was proclaimed establishing "a new system for the importation, trade, and exportation of gold." It was later amended, but information thereon is lacking. The structure of the gold depositary in Uruguay is more complicated than in Tangier. The Uruguay gold certificates are to be issued by the Fiduciary Company of Uruguay, S. A., Montevideo (apparently not a "bank"), whereas, for reasons not indicated, the gold is taken in custody by another institution, the bank La Caja Obrera in Montevideo. The emphasis is on the "bearer" type of certificates. The contract terms are less

[89] See on the Tangier Bank, Bratter, "Gold markets in a perturbed world," *Commercial and Financial Chronicle*, Aug. 21, 1952, pp. 1 ff. I have also used a pamphlet, *Die Goldzertificate der Société de Banque Tangero-Suisse, Tanger*, published by this bank.

[90] Manuel Diaz Merry, *Tanger—Tratados, Codigos, leyes y Jurisprudencia de la Zona Internacional* (1953), offers little information on these problems.

[91] *Commercial and Financial Chronicle*, Sept. 16, 1952, at p. 28. The opinion of the Swiss Federal Court, *supra* n. 64 refers to the tax. In May, 1954, the tax was abolished, *Int. Financial News Survey*, VI (1954) 360.

[92] On the following see Bratter, "Needling U.S. to raise gold prices" in *Commercial and Financial Chronicle*, Nov. 6, 1952, pp. 6, 27, and next note.

satisfactory than those of the Tangier bank. The latter promises that the conformity of its gold stores with its certificates will be examined at least once a year by the firm of Price, Waterhouse & Cie, Zurich. There is nothing similar in the Uruguayan provisions. The general manager of the Caja Obrera allowed himself to be interviewed on various points by an American journalist.[93] For example, the manager emphasized the bank's obligation of secrecy in case the United States Government would inquire into ownership of the gold deposits. We shall not expatiate on the fact that the "Fiduciary Company of Uruguay" apparently is not a "bank" and that public interest may well take precedence over a bank's obligation to secrecy.[94] More important, the government of the country where the gold is held may proceed to a general registration, sequestration, and perhaps confiscation of foreign assets, gold or not, and leave it to the foreigners to prove such claims as are left to them. This is the experience that German capitalists had to undergo during and after World War II.[95] They had placed tremendous assets officially or unofficially in Switzerland, a neutral country. Yet under the pressure of the Allied powers as well as for the protection of Swiss public interests, all assets recognized as or suspected to be German were sequestrated and confiscated; the duties of secrecy generally laid not only upon bankers but upon lawyers and notaries were, to this extent, rescinded by law.[96] The course taken by the Swedish Government was similar.[97]

Holding of gold certificates of the Tangierian or Uruguayan type is not prohibited in this country—the "gold certificates" which must be surrendered to the United States Government are those issued by the Government itself. Still the fate of the American certificates does not augur well for the holders of the Tangierian or Uruguayan documents. Prior to 1933, American "yellowbacks" were considered everywhere as the summit of security, and considerable amounts went abroad. However, the foreign holders were affected by the later American regulations in the same way as United States residents and had to be content with the nominal amount of dollars indicated on the notes with no regard for the actual gold

[93] Bratter, "How Uruguay's gold-certificate market works" in *Commercial and Financial Chronicle*, April 19, 1953, p. 3.

[94] This and other limitations of the banker's obligation are recognized even in England, probably the country having the finest tradition in banking. See *Encyclopedia of the Law of England*, II (1938), 72. In this country there has been surprisingly little discussion of the subject.

[95] Seeliger, *Das ausländische Privateigentum in der Schweiz* (1949) 138 ff., 188 ff.; *cf.* also Mann, "German Property in Switzerland," *Br. Yb. Int. Law* (1946) 354.

[96] Städter, *Deutsche Vermögenswerte im Ausland* (1950).

[97] The rights of the German owners were partly restored by international agreements, *Dept. of State, Bulletin XXVII* (1952) 363.

value;[98] it was leniency on the part of the United States Government not to prescribe a time limit for the registration or surrender of the certificates.[99] There is certainly no justification for placing greater confidence in the governments of Tangier and Uruguay than in that of the United States.

[98] As ordered first by the Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, §2; on the resulting Executive and Treasury Orders, *cf. Money in the Law* 598 n. 23.

[99] Such a limit was set only for persons within a place subject to the jurisdiction of the United States, Executive Order of Aug. 28, 1933, No. 6260, §3; 12 U.S.C., p. 452. In a comparable case, the Belgian Government exhibited little consideration for American holders of called-in Belgian securities, *Money in the Law* 427 n. 45.

EDGAR BODENHEIMER

Significant Developments in German Legal Philosophy since 1945

I

In a short but illuminating essay "Regarding the Clarification of the Concept of Law,"[1] Professor Alfred Verdross-Drossberg of the University of Vienna points out that the innumerable historical attempts to define the term "law" may be divided into two basic approaches to the subject. Under the first view, the law is regarded as a *reasonable* and *moral* order of the community life. Its essential character is seen as determined by its *contents:* if the prescriptions of the law are "right" and persuasive, as tested by the postulates of universal reason or by the contingent needs of the time and place, they will be accepted and observed by the members of the community.[2] It is conceded that there will always be a noncooperative minority against whom compulsion must be used as a means of enforcing the law; but the threat or exercise of such compulsion is regarded as a secondary sanction not entitled to enter into the description of the phenomenon "law" as an essential or indispensable element.

The second basic approach is well epitomized by Thomas Hobbes in his famous apothegm: "Not rightness, but authority makes the law."[3] According to this theory, law is an act of will emanating from the wielders of governmental power in a given society. Any general mandate issued by the ruling authorities of the state in the prescribed form has the quality of "law" irrespective of its substantive contents. Constraint here tends to become an indispensable attribute of the legal order since the elements of reasonableness and persuasiveness are not material to the existence of law

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[1] Verdross-Drossberg, "Zur Klärung des Rechtsbegriffs," 72 Juristische Blätter (1950) p. 97.

[2] See in this connection the discussion between Alcibiades and Pericles reported by Xenophon in his Memorabilia I, 2, 40–46 (Loeb Classical Library ed.), in which Alcibiades expresses the view that "whatever the assembled majority .... enacts *without persuasion* is not law, but force." (Underscoring supplied). The full text can also be found in LeBuffe-Hayes, The American Philosophy of Law (1947), p. 67.

[3] Hobbes, Leviathan (Latin ed., 1670) Pt. II, c. 26. The Latin version of the phrase (*Non veritas sed auctoritas facit legem*) is perhaps more suggestive than the English formulation "Law, in generall, is not Counsell but Command." (Everyman's Lib. ed., Pt. 2, c. 26).

and can, therefore, not be relied upon as the principal guarantees of compliance.

World jurisprudence since the days of the ancient Greeks has vacillated between these two fundamental modes of viewing the law, and alternations in their dominance can be observed in the legal history of all civilized countries. German jurisprudence, with which we are concerned in this article, was under the strong influence of the second approach, generally referred to as "legal positivism," from the middle of the nineteenth century to the end of World War II. Among the representatives of this type of jurisprudential thinking in Germany, Bergbohm, Jhering, Laband, Jellinek, and Kelsen are perhaps the most famous names. The first approach, commonly denominated as "natural-law" thinking, played a subordinate role during this period and had practically no impact on legal practice. Since the close of World War II, however, German legal philosophy has undergone a sudden and incisive transformation in those parts of Germany which are today occupied by the Western powers.[4] The natural-law philosophy has reappeared on the scene in full armor and has experienced a process of revitalization, while positivism—for the time being at least—has been pushed back into a strongly defensive position. The rebirth of a philosophy which rejects a purely formal and imperative view of the law and which imports ethical criteria into jurisprudence has not remained confined to theoretical speculation but has, as we shall see, significantly influenced recent judicial practice.

The reasons underlying this reorientation in German jurisprudence have been ably expounded by Professor Wieacker in his *History of Private Law in Modern Times*,[5] one of the outstanding German legal publications

[4] The present article is limited to postwar developments in the Western Federal Republic and will not discuss jurisprudential trends in the Soviet zone of Germany. The chief source of information for the latter is the official East German legal periodical "Neue Justiz." See, for instance, Such, "Marxismus und Interessenjurisprudenz," Neue Justiz 1947, p. 229; Neuhaus, "Materialistische Jurisprudenz," Neue Justiz 1948, p. 203; Such, "Jenseits von Materialismus und Idealismus," Neue Justiz 1948, p. 203.

German controversies in the field of *legal method* are likewise not discussed in this article. Concerning the famous battle between the "conceptionalists" and the proponents of a "jurisprudence of interests," see now Müller-Erzbach, Die Rechtswissenschaft im Umbau (1950), and Coing, "System, Geschichte und Interesse in der Privatrechtswissenschaft," Juristenzeitung 1951, p. 481. A new theory of logic in law, based on recent developments in general logical science, has been presented by Ulrich Klug in his Juristische Logik (1951). Attention may also be called to Tammelo, Untersuchungen zum Wesen der Rechtsnorm (1947).

[5] Wieacker, Privatrechtsgeschichte der Neuzeit (1952). The title of this work does not do full justice to its contents. It is not so much a history of the positive institutions of modern private law as a history of its methodology, with particular emphasis on German developments. It attempts to trace the influence of natural-law doctrine, historicism, Pandectism, positivism, naturalism, etc. on the evolution of the private law and brings to light the interplay between philosophical and methodical attitudes and the actual life of the law. The author is professor of law at the University of Göttingen.

of the postwar period. Professor Wieacker shows that the perversions of an "illegitimate" positivism, which sanctioned the most hideous cruelties and injustices committed by the rulers as long as they were clothed in the outward forms of the law, produced a strong reaction and revulsion after the war and furnished one of the chief causes for the revival of a value-oriented theory of justice.[6] Wieacker is convinced that, while the material values violated by an "unjust" law can rarely be identified with methodical certainty, the actual experience of oppressive injustice will always result in a renewed search for the moral foundations on which the ultimate legitimacy of all legal orders must necessarily rest.[7] The resplendence of the great historical systems of law, he maintains, "would be lost if the light of justice, refracted in the realities of legal orders, became extinguished."[8] It may be added to his penetrating observations that the shortcomings of an undiluted legal positivism will remain undetected only in those peaceful and saturated periods of legal history in which disjunctions between the positive law and the prevailing ideals of justice are rare and unusual. In times of crisis, social stress, or tyrannical government, any complacent belief in the ethical neutralism of the law will inevitably be shattered.

II

It is symptomatic for the postwar reorientation in German legal philosophy that the most eminent German legal philosopher of the pre-Hitler period, Gustav Radbruch, revised some of his basic theories of law and justice under the impact of the events which took place between 1933 and 1945. Radbruch had been known as one of the chief representatives of a school of jurisprudence described as "relativism."[9] According to this school of thought, legal science is precluded from pronouncing any value judgments on the ultimate goals of the social life, whether they are oriented towards individualism, collectivism, or the "transpersonal" unfolding of cultural values. The science of jurisprudence is held limited to the task of clarifying the character of these ultimate objectives and

[6] *Id.*, pp. 327 *et seq.*, 348 *et seq.*

[7] *Id.*, pp. 327–328.

[8] *Id.*, pp. 356–357.

[9] On Radbruch see Friedmann, Legal Theory, 2nd ed. (1949), pp. 117–121; Bodenheimer, Jurisprudence (1940), pp. 296–299. The third edition of Radbruch's Rechtsphilosophie (1932) was translated by Kurt Wilk in The Legal Philosophies of Lask, Radbruch, and Dabin, Vol. IV of the Twentieth Century Legal Philosophy Series (1950), pp. 43 *et seq.*, see also Review, this Journal, Vol. 1, pp. 150 *et seq.* A recent German evaluation of the work of Radbruch is F. von Hippel, Gustav Radbruch als rechtsphilosophischer Denker (1950); See now also, Fuller, "American Legal Philosophy at Mid-Century," 6 Journal of Legal Education (1954), 457, 481–485.

investigating the means by which they can be most effectively realized through legal effort.

In his prewar writings Radbruch took the position that not only the goals of social life, but also the (narrower) goals of the institution of law are subject to the law of relativity. Law is designed to serve the ideals of justice, security, and expediency, he maintained, and these three ideals often come into conflict with each other. There are no scientific tests by which their relative rank and importance can be ascertained, and there is nothing in the concept of law itself which obligates the legislator to give preference to one over the others. The absolutist state of the 18th century ("*Polizeistaat*") made political expediency dominant and relegated justice and security to a secondary position; the age of natural law sought to deduce the contents of legal orders from paramount principles of justice; the nineteenth century regarded the achievement of legal certainty as the sole aim of the law. Each view, he maintained, was compatible with the idea of law.

In 1947, after having been restored to his professorship at Heidelberg following a period of forced retirement under the Nazis, Radbruch published a book entitled *A Primer of Legal Philosphy*.[10] In this work, while reiterating most of the basic views expressed in his earlier works, he made one significant concession to natural-law doctrine. There are certain *absolute* postulates, he argued, which must be realized by every system of law. The law must guarantee at least a minimum of individual freedom, and a complete denial of human rights from a collectivistic or supernationalistic point of view is "absolutely false law."[11] In taking this position, Radbruch abandoned one of the citadels of his former relativism by insisting on certain minimum standards of justice as a scientific criterion of "right" law.

Radbruch developed his new position in greater detail in an article published under the title "Statutory Wrong and Supra-Statutory Law."[12] For many decades, he pointed out, German jurisprudence had been dominated by the positivistic axiom "a law is a law." The idea of a "statutory wrong" was considered a contradiction in terms. Totalitarianism, he felt, proved the untenability of this view since it overlooked the fact that crimes may be committed not only by individuals but also by governments "in the name of the law." A duty of obedience, Radbruch reasoned, can never be grounded on the mere factual existence of a for-

[10] Radbruch, Vorschule der Rechtsphilosophie (1947).

[11] *Id.*, pp. 27–28.

[12] Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht," Süddeutsche Juristenzeitung 1946, pp. 105 *et seq.* The article is reprinted as an appendix to the 4th edition of Radbruch's Rechtsphilosophie (1950), edited after his death by Erik Wolf.

mally valid command, but must take into account the contents of the decree. Political expediency from the point of view of the rulers does not suffice to impart legitimacy to a statute.[13] This does not mean that a statute, for the sake of order and legal security, should not, as a rule, be entitled to obedience even if it is unjust. But in extreme cases, he said, where the conflict between positive law and justice becomes *unbearable*, the statute must yield to the superior requirements of justice.[14] Radbruch was conscious of the difficulty involved in drawing the line between statutory "non-law" and valid law with an unjust content. He also realized the danger resulting to legal security from a recognition of the concept of a "statutory wrong." He took the position, however, that these dangers cannot be obviated by a return to an outmoded and immoral positivism, but that they must be met on the political level by a determined and vigorous battle against the evils of totalitarian despotism.

III

It is of interest to note that the postwar renaissance of natural law in Western Germany did not receive its main impetus from the Roman Catholic Church,[15] but was carried forward by Protestant thinkers, particularly men of the Calvinist faith. It was a Swiss Calvinist theologian, Emil Brunner who, in a book published in 1943,[16] made the first strong breach into the virtual monopoly of natural-law thinking theretofore enjoyed in German-speaking countries by the Neo-Thomist school. In the preface to his book he points out that the Catholic Church, drawing on centuries of tradition, had always possessed an impressive theory of justice, while Prostestant Christianity had produced none for a period of 300 years.[17] He announces that in order to remedy this deficiency, he had undertaken to develop a detailed philosophy of justice based on the premises of a neo-fundamentalist Protestant theology.[18]

[13] *Id.*, p. 110. In formulating this principle, Radbruch established a hierarchy between the three fundamental values served by the law (justice, expediency, and security) and thereby revised his earlier view, according to which they occupy an equal rank.

[14] *Id.*, p. 107.

[15] Roman Catholic jurists, of course, had always been critical of the juridical positivism prevalent in Germany before 1945. One of the leading works by a German Catholic is Rommen's Die ewige Wiederkehr des Naturrechts (1936), translated into English under the title Natural Law (1948).

[16] Brunner, Gerechtigkeit (1943), translated into English under the title Justice and the Social Order (1945). Although Brunner is a German-speaking Swiss rather than a German, his influence on recent German philosophy justifies a discussion of his theories in this article.

[17] *Id.*, p. 1.

[18] Brunner, while using the tools of natural-law thinking, recommends abandonment of the term "natural law" because of the multiplicity of its meanings. He wishes to replace it by a more descriptive word, such as "justice." *Id.*, p. 87.

Brunner proceeds from the assumption that human beings are endowed with an innate sense of right and wrong which enables them to distinguish between just and unjust laws. Since there exist objective criteria for the measuring of justice, he says, Cicero's and Ulpian's definition of justice as the "rendering to each man of what is due to him" is meaningful and acceptable.[19] He points out, however, that the practical application of the test is not easy because that which is "due to man" may be equality of rights in some cases and differentiation in legal treatment in others. According to the Christian view, he asserts, all individuals are entitled to be recognized as "persons" endowed with human dignity, but this equality of dignity should be contrasted with a "difference in kind and function" between human beings which legal regulation must take into account. In his opinion, however, equality and the equal rights of all are "primary," while the differences in what is due to each person are, "though not inessential, secondary."[20] Brunner applies his general conclusions to a great number of concrete social problems, such as marriage, family organization, property, price and wage control, distribution of economic power, planning of production, and the possibilities of achieving an international limitation of national sovereignty.[21]

An influence of some of the broad ideas expounded by Brunner can be traced in the writings of Helmut Coing, a leading representative of a non-Thomistic natural-law philosophy in Germany.[22] Coing, however, goes much further than Brunner in trying to deduce a large number of concrete legal principles, which he calls "the supreme principles of the law," from certain philosophical, psychological, and ethical premises.[23] Law to

[19] *Id.*, pp. 17 *et seq.*

[20] *Id.*, pp. 42–43. The Aristotelian influence in Brunner's theory of justice is clearly noticeable, although some well-taken criticism of Aristotelian doctrine can be found in the book. See, for instance, pp. 29–30.

[21] Karl Barth, another leader of neo-orthodox Protestantism, criticizes some aspects of Brunner's approach. In his opinion, man's nature—and therefore civil society as a whole—is corrupt, and the empire of divine justice is not of this world. For this reason, it is impossible to deduce from the nature of man as an individual and social being any supreme principles of just law. See Christengemeinde and Bürgergemeinde (1946), pp. 17 and 19, and Recht und Rechtfertigung (3rd ed., 1948), p. 46. *Cf.* also Wieacker, *op. cit.* note 5, pp. 145, 339, 349.

Erik Wolf, a Protestant jurist advocating a close alliance between jurisprudence and theology, is of the opinion that absolute principles of justice cannot be derived from nature or reason, and that any "self-justification of the law" is impossible. Absolute justice must be sought in God, and God has revealed his will only in the Holy Scriptures. According to his view, only the words of the Bible can serve as a guide for the ascertainment of "natural law." See Wolf, Rechtsgedanke und Biblische Weisung (1948).

A "Christian Jurisprudence," overcoming the antithesis between positivism and natural law, is postulated by Walther Schönfeld in his Grundlegung der Rechtswissenschaft (1951).

[22] Coing is professor of law at the University of Frankfurt.

[23] Coing, Die Obersten Grundsätze des Rechts: Ein Versuch zur Neubegründung des Naturrechts (1947); see also his later work Grundzüge der Rechtsphilosophie (1950).

him is an order of commands whose obligatory force rests ultimately on the conformity of these commands with ethical postulates.[24] These ethical postulates are not purely subjective expressions of individual preferences but are founded upon certain psychological facts common to all men. For this reason, human communication concerning them is possible and certain objective truths can be stated about them. Furthermore, these ethical values stand to each other in the relationship of a certain hierarchy, although their relative rank is not easily amenable to human cognition.[25]

Coing insists that the legal principles which rest on these objectively verifiable ethical foundations must be recognized and respected by all "genuine" orders of law. Their obligatory force and sanctity is derived from the fact that they are referable to certain phenomena and situations in human social life which are typical and recurring and which, whenever they occur, produce identical or similar reactions. Thus, the supreme principles of law are in the last analysis rooted in the nature of man as a social being. Examples of such supreme principles are the following:[26] granting legal capacity to normal adults; protecting life and bodily integrity; recognizing the right of private property; safeguarding the reputation of the individual; sanctioning a sphere of privacy; granting a right to education; permitting freedom of speech, assembly, and religion; insuring fulfilment of contractual obligations; protecting men against fraud, chicanery, and overreaching; preventing arbitrary treatment of inferiors by their superiors; setting up a system of procedure which guarantees a fair and impartial treatment to litigants by an independent judiciary; establishing exemptions from military service for conscientious objectors; disallowing punishment of violators of the law acting without *mens rea;* outlawing the death penalty; recognizing monogamy as the only legitimate union of men and women; and restricting the freedom of dissolving a marriage. Coing concedes that these principles cannot be hypostasized into illimitable absolutes; they are susceptible of restriction in the interests of the general welfare. He insists, however, that they may not be touched in their substance and core.[27]

Any theory of law which assumes the existence of a suprapositive body of legal principles must come to grips with the problem of conflicts between the "supreme" and the positive law. Coing takes the position that

[24] Coing, Grundzüge der Rechtsphilosophie, p. 18.

[25] *Id.*, p. 108. Coing's theory of value is influenced by the phenomenological school of philosophy, especially by Nicolai Hartmann's Ethik (3rd ed., 1949) and Max Scheler's Formalismus in der Ethik und die materiale Wertethik (3rd ed., 1927).

[26] See Coing, die Obersten Rechtsgrundsätze, pp. 61–112; Grundzüge der Rechtsphilosophie pp. 170–200.

[27] Coing, Grundzüge der Rechtsphilosophie, pp. 178–179.

a law enacted by the state which violates a "supreme principle of law" is not void but justifies, in extreme cases, active or passive resistance on the part of the people or the law-enforcing authorities. Resistance is not mandatory, but permissive, and failure to exercise the right does not *per se* result in criminal responsibility. As far as the judicial process is concerned, Coing believes that the judge, if confronted with an insoluble conflict between a positive law and a supreme principle of just law, must prefer the latter to the former; if afraid of the consequences of such action, he should lay down his mandate.[28]

The trend toward a legal philosophy of values, which reached perhaps its climax in Coing's theory of jurisprudence, is also reflected in the writings of Professor Walter G. Becker of the Free University of Berlin. While Becker rejects the notion of natural law as a transcendental system of binding norms, he attributes to natural law a "symptomatic significance" as a shorthand expression for judicial conduct motivated by the idea of "effective law improvement." There are situations, he says, where the judge must by all means try to avoid a morally reprehensible or thoroughly inequitable result, even though this result may be commanded or sanctioned by the positive law.[29] This view would seem to impart to natural law a meaning almost identical with the Aristotelian notion of "equity," i.e. a set of judicial correctives designed to alleviate the rigidity and inflexibility of strict law.[30]

A legal thinker of the older generation, Wilhelm Sauer, is strongly in sympathy with the renewal of emphasis on ethical and cultural values in German legal philosophy.[31] Legal security alone cannot be the ideal of the law, Sauer insists; the law must strive vigorously for the attainment of

[28] See Coing, Die Obersten Grundsätze des Rechts, pp. 59–61; Grundzüge der Rechtsphilosophie, pp. 167–169, 257–258.

The right to resist unjust laws is also recognized by Brunner, Justice and the Social Order, p. 94, but only to the extent that a government has degenerated into a tyranny. If the people have been deprived of the lawful means of altering an intolerable state of the law, they must be permitted, he says, to give expression to their feeling of outrage by resistance.

[29] Becker, "Die symptomatische Bedeutung des Naturrechts im Rahmen des Bürgerlichen Rechts," 150 Archiv für die Zivilistische Praxis (1949) 97, 121.

[30] In an article entitled "Die Realität des Rechts," 40 Archiv für Rechts-und Sozialphilosophie (1952) 216 *et seq.*, 375 *et seq.*, Becker sought to develop some ideas for a general theory of private law broad enough to encompass civil law as well as common law jurisdictions. In this essay he advocates an integration of sociological-realistic and ethical approaches to the law with analytical-logical methods which would result in a thorough overhauling and re-interpretation of fundamental legal conceptions.

Becker's views resemble those expressed by Jerome Hall in his "Integrative Jurisprudence," Interpretations of Modern Legal Philosophies (1947), pp. 313 *et seq.*

[31] See his System der Rechts-und Sozialphilosophie, which appeared in a new and completely revised edition in 1949.

justice, defined by him as the "conscience of the nation."[32] Legal security, the proximate aim of the law, can always be accomplished. Justice, its ultimate aim, cannot always be realized, but must remain the chief guiding star of legal regulation. Sauer recognizes a right of resistance, especially against the execution of unjust statutes, in the case of "intolerable, permanent, irremediable infractions;" in such cases, he maintains, the "right" may sometimes become converted into a duty.[33]

IV

The antipositivistic trend in recent German jurisprudence has not remained confined to the realm of theoretical scholarship and speculation. It has filtered down into the practice of the courts and has received official recognition in a number of decisions by the Supreme Federal Court (*Bundesgerichtshof*) of the West German Republic. The cases which exemplify judicial acceptance of the trend deal mostly with the legality of acts, private as well as official, which took place during the period of National Socialist dictatorship and which were either sanctioned or commanded by the law then in force. We shall first discuss a number of lower court and regional supreme court decisions rendered before the creation of a unified appellate tribunal for all of Western Germany, and then turn to the recent adjudications of the Supreme Federal Court.

The first important decision evidencing the emergence of the new approach in court practice was handed down by the district court (*Amtsgericht*) at Wiesbaden in 1945.[34] The parents of the plaintiff were Jews. In 1942 they were deported, and their property was confiscated. A few years later they died in a concentration camp. Defendants acquired the confiscated property from the Finance Office. Plaintiff sued for the restitution of the property.

The court sustained the action. "According to the doctrine of natural law," said the court, "there exist certain rights which the state cannot abolish by legislative act. These are rights which are so deeply rooted in the nature and essential characteristics of human beings that their abrogation would destroy the nature of man as a spiritual and moral being." The court held that the right to own personal property fell within this group of rights. The state may exercise the right of taxation or of eminent domain, but it may not deny the right to hold property to a group which has not been guilty of any reprehensible conduct. The conclusion reached by the court was that "the laws which confiscated the property of Jews

[32] *Id.*, p. 195.
[33] *Id.*, p. 248.
[34] Reported in Süddeutsche Juristenzeitung 1945, p. 36.

were in contravention to the natural law and therefore null and void." Hence, the Finance Office could not lawfully sell, or otherwise dispose of, the property belonging to the plaintiff's parents.[35]

A similar position was taken by the highest court of West Berlin in a case involving the nationalization of an insurance company in the Soviet zone of Germany.[36] The plaintiff successor of the expropriated firm demanded payment of debts owed to the former private company by persons living in West Berlin. The court denied the claim, pointing out that an expropriation without compensation, regardless of its legalization by statute or decree, was against good morals and incompatible with the principles of a government by law (*Rechtsstaat*). The Soviet confiscation should therefore be regarded as a "purely arbitrary act" upon which no legally enforceable claim could be based by the beneficiary of the expropriation.

A holding to the effect that administrative orders and regulations of a government agency may be nullified if they amount to a "gross violation of the laws of morality" was handed down by the Supreme Regional Court at Stuttgart.[37] The Court pointed out that this question used to be highly controversial but that it should be answered in the affirmative "without qualification" under the legal convictions of the new era. In this case the court struck down, on the ground of "moral repugnancy," a formally valid ordinance of a rationing agency distributing scarce food articles to the employees of a government bureau as a Christmas bonus, although these articles had previously been reserved for consumption by persons afflicted with tuberculosis or other serious diseases.

A distinction between "absolutely immoral laws beyond the power of any government" and valid military measures taken in the course of an illegal, aggressive war was drawn by the Supreme Regional Court at Kiel.[38] The court expressed the view that a decree of the "Führer" ordering the extermination of certain inmates of a concentration camp on the ground that they were no longer able to work, was such a severe violation of the idea of justice that it should be regarded as void *ab initio*. On the other hand, a Nazi law imposing the death penalty for desertion from the army in World War II was held to be valid and enforceable, notwithstanding the fact that this war had been adjudged to be an illegal war of aggression by the decision of the International Military Tribunal at Nuremberg.[39]

[35] See comment on this decision by Walter Becker, *op. cit. supra* note 29, p. 97.

[36] Decision of the Kammergericht (West) of December 15, 1950, reported in Deutsche Rechtsprechung I (181) Blatt 19 zu (b).

[37] Decision of the Oberlandesgericht Stuttgart of April 9, 1946, reported in Süddeutsche Juristenzeitung 1946, p. 236.

[38] Decision of the Oberlandesgericht Kiel of March 26, 1947, reported in Süddeutsche Juristenzeitung 1947, p. 323.

[39] 8 Federal Rules Decisions 69 (1947)

The court in this case affirmed a lower court judgment convicting a deserter from the army who had killed a policeman trying to arrest him; evidence tending to show that the deserter had acted from motives of implacable opposition to the Hitler regime was deemed to be without relevancy to the issue.

Of particular interest is a decree issued by the Supreme Regional Court at Bamberg in 1949.[40] The defendant, after her husband had been drafted into the army, had become infatuated with another man and wished to get rid of her husband. When he returned home for a short furlough, he made several critical comments about Hitler and expressed his regret that "Hitler had not gone to the devil" on July 20, 1944, when an unsuccessful attempt aginst his life had been made. The defendant wife immediately reported this remark to the local chief of the Nazi party. Her husband was thereupon tried in a military court and upon the testimony of the defendant sentenced to death. The execution of the sentence was later suspended, however, and the husband was given an opportunity to obtain parole by "distinguishing himself at the front."

After the war, the defendant wife was indicted for "having deprived her husband of his liberty" in violation of Section 239 of the German Criminal Code. The court pronounced her guilty of the offense and sentenced her to a term of imprisonment. In taking this view, the court was guided by the consideration that the defendant, when she denounced her husband with the local authorities, acted of her own free will in pursuit of a highly immoral purpose. Although the judgment convicting the husband was held to be legal and valid,[41] the court considered the action of the defendant which led to the conviction, although in conformity with Nazi morality, to be beyond the pale of the law.

After a Supreme Federal Court was established for Western Germany in 1950, an almost identical fact situation was presented to the court.[42] Here the defendant, who had tried to rid herself of her husband by reporting to the police some unfavorable comments he had made about the Nazi leaders, had been convicted by the trial court for an attempt to commit homicide. The Supreme Federal Court affirmed the judgment. Unlike

[40] Decree of the Oberlandesgericht Bamberg of July 27, 1949, reported in Deutsche Rechtszeitschrift 1950, p. 302.

[41] In reaching the conclusion that the military court was acting within the scope of its authority in sentencing the husband to death, the court observed that the law permitting capital punishment for adverse criticism of the regime was "not against natural law," because it merely imposed a duty of silence. Only laws commanding *positive* conduct "prohibited by divine or human law according to the convictions of all civilized nations" may, in the view of this court, be nullified because of repugnancy to the "law of nature."

[42] Decision of the Bundesgerichtshof of July 8, 1952, reported in Entscheidungen des Bundesgerichtshofs in Strafsachen (hereafter abbreviated BGSt), vol. 3, p. 110 (1952).

the Bamberg court, this court pronounced illegal not only the denunciation, but also the sentence of death to which it led. The husband had been convicted by a military tribunal under a statute which forbade the "public commission of acts" tending to subvert the morale of the armed forces. The Supreme Federal Court took the position that remarks made by a husband to his wife in the privacy of their home (he had said that "Goebbels is a knave" and "if Hitler had died on July 20, the whole mess would be over") could under no conceivable interpretation of the statute be construed as "public" acts of subversion. Furthermore, the imposition of the death sentence was in the court's opinion so out of proportion to the deed that the judgment was held lacking in legal force on this additional ground. The court went on to say that the defendant, knowing that her denunciation would most likely result in capital punishment, had deliberately taken this step and had later refused to exercise her privilege not to testify at the trial, to which the judge had called her attention. She had thereby, in the court's view, actively participated in an illegal attempt at homicide. (Her acts did not go beyond the attempt stage since the death sentence imposed upon the husband was later suspended; he was then sent to the front and taken prisoner by the enemy).[43]

In an earlier case, the court was confronted with the problem whether persons organizing the deportation of Jews to extermination camps in Poland were guilty of aiding and abetting the commission of murder.[44] The defendants had prepared lists of deportees and had accompanied the transports to their place of destination. The lower court held that the objective elements of the crime had been fulfilled, but that the defendants did not have the requisite *mens rea* since they considered it their duty to obey their government and to help carry out its policies. The Supreme Court reversed the decision on the ground that the lower court's reasons for acquittal were erroneous. The prerogative of a government to determine the boundary line between that which is allowed and that which is forbidden cannot be deemed unlimited, the court said. There exist "certain maxims of human conduct regarded as inviolable which in the course of time have come to be recognized by all civilized nations on the basis of common ideas of morality and which are held to be legally obligatory, regardless of whether the laws of some particular nation permit them to be disregarded."[45] A law sanctioning arbitrary arrest and deportation by the secret police cannot give this organ a blank check for the violation of "that core of rights which according to common legal convictions no law

[43] See also the decision of the Bundesgerichtshof of November 6, 1952, BGSt 4, 66 (1952), involving a similar question.

[44] Decision of the Bundesgerichtshof dated May 8, 1951, BGSt 2, 235 (1951).

or other official act may touch." It cannot be assumed, the opinion went on, that the defendants, all of whom had received their education and moral upbringing in the period preceding National Socialist rule, were unaware of these general principles basic to human life in society.

The Supreme Federal Court took a similar position in a case in which a farmer was killed by the local leader of the Nazi party pursuant to a government order authorizing the execution without trial of persons guilty of "defeatism."[46] The farmer, according to an unsubstantiated denunciation, had prepared lists of Nazi leaders for submission to the allies. The defendant had also shot to death the son of the farmer who had left his battalion in 1945 and taken refuge at his father's farm. In a civil trial the defendant was ordered to pay damages to the wife of the farmer for the loss of her husband and son, and the judgment was affirmed on appeal.

The court, citing the article by Radbruch discussed above,[47] pointed out that a statute or other official act "reaches the end of its bounds at a point where it comes into conflict with generally recognized principles of international law or natural law, or where the contrast between positive law and justice becomes so unbearable that the positive law, being 'false law,' must yield to justice."[48] A decree which permits the killing of human beings on suspicion and without the observance of even the rudiments of fair procedure offends, in the opinion of the court, against the principles of natural law and may not with impunity be observed.

These principles have in several recent cases been reaffirmed by the Supreme Federal Court, and would appear to represent the considered view held by that court at the present time.[49]

V

The natural-law trend characteristic of postwar German jurisprudence has not remained without challenge. There are legal scholars as well as practitioners and judges in Germany today who deplore the rescuscitation

[45] *Id.*, p. 237.

[46] Decision of the Bundesgerichtshof of July 12, 1951, reported in 3 Entscheidungen des Bundesgerichtshofs in Zivilsachen (hereafter abbreviated BGZ), vol. 3, p. 94.

[47] See *supra* note 12.

[48] *Id.*, p. 107.

[49] See, for instance, the decision of November 2, 1953, BGZ 9, 34 (1953), in which the anti-Jewish legislation of the Third Reich was declared to be "not law, but its very opposite, i.e. gross injustice." In that case the court pointed out, however, that redress for the wrongs committed by this legislation could not be made according to general principles of equity and fairness, but was to be given only within the framework of the restitution statutes.

Cf. also the decision of April 23, 1952, BGZ 6, 28 (1952), where the destruction and burning of Jewish property by the Nazi government was held to constitute the criminal offense of "riot," so that the plaintiff who was insured against this risk was allowed a claim against his insurance company.

of a philosophy which, in their opinion, was rightly discarded because it is apt to jeopardize the stability and predictability of the law. However, even among the adversaries of the trend there are none who are inclined to favor a return to a formalistic and analytical positivism of the type advocated by John Austin or Hans Kelsen.

Among the outspoken critics of a revived natural law must be counted Professor Karl Engisch of the University of Munich. In a review of Coing's "The Supreme Principles of Law" he confesses that his "relativistic doubts" were not dispersed by the arguments of Coing.[50] He questions the legitimacy of any theory of value pretending to general validity. The convinced Bolshevist, he argues, has a conception of law and the state at variance with that of the liberal West European; the passionate sportsman judges the value of intellectual activity differently from the university professor; the judge called upon to decide a conflict of interests wavers desperately between contradictory appraisals of the merits of the case. There is no need, he says, to arrive at any absolute standard for the decision of such conflicts. In matters of justice, especially, one is confronted with personal viewpoints, shaped perhaps by the general climate of the times, but not with insights into a fixed hierachy of values. Engisch concludes that Coing's system represents no more than "a chart of modern occidental value consciousness, strongly influenced by Christianity."[51]

In his own affirmative philosophy, Engisch seeks to steer a middle course between what he calls the "normativistic" and "naturalistic" falsifications of the law.[52] He denies the possibility—vigorously affirmed by Kelsen—of drawing a "specifically juristic picture of the world" and devising a "pure" jurisprudence which will bracket out all natural realities of social life. He also objects to the idea that the jurist can adopt the methods of the natural scientist in simply analyzing "facts" on the basis of physical and psychological data. In his opinion, the law deals with a sector of life which is concerned with the practical activities of human beings in society. This activity is not exclusively, or even primarily, determined by physical, biological, or psychological facts; it also encompasses, in a very conspicuous manner, the higher life of the spirit with its specific value judgments.[53] The natural world and the normative world of the law, he maintains, are deeply intertwined and cannot be torn

[50] Engisch, Book Review, Archiv für Rechts-und Sozialphilosophie 1949, p. 271.

[51] This passage is a quotation from an article by the German philosopher Eduard Spranger, entitled "Zur Erneuerung des Naturrechts," Universitas III (1948), p. 405, in which Spranger criticizes the views of Coing.

[52] Engisch, Vom Weltbild des Juristen (1950) p. 13.

[53] *Id.*, p. 17.

apart in any scientific theory of the law. In pursuing these methodological premises, Engisch inquires into various general aspects of jurisprudence, such as the "gap problem" in statutory interpretation,[54] "space" and the law,[55] "time" and the law,[56] "empty spaces" in the law,[57] and the problems of causality.[58]

Engisch's views bear some similarity to those held by Professor Hans Welzel of the University of Bonn. In an interesting work entitled "Natural Law and Material Justice," Welzel contends that the solutions of legal problems suggested by natural-law thinkers have led to contradictory and scientifically untenable results.[59] We can no longer deny, he maintains, the "contingent" nature of all historical phenomena and ideologies. Justice, as Hegel saw with clarity, can unfold in society only by a dynamic, dialectical process. No concrete decision can be derived from timeless, ideal principles. Not abstract values, but concrete goods form the goal of human actions.[60] We cannot once and for all, and with infallible definiteness, ascertain the nature of these "concrete goods." It is true that positivism must be overcome, Welzel states, but it cannot be defeated by any retrogression to the concept of a "suprapositive" law, which leads to the dissolution of the limit-setting functions of the law. Positivism must be conquered by the analysis and elaboration of the substantive-logical ("*sachlogische*") elements which can be found in every source of law.[61] Welzel seems to be influenced in his conclusions by Hegalianism as well as the phenomenological school of thought, which aims at the discovery of the "essential" character of social phenomena and the inherent purposes to which human institutions are devoted. In his view, the impact of social phenomena on the rules of the law must be taken into account by the jurist and judge; he thus rejects a formalistic jurisprudence and advocates interpretation of legal rules in the light of their social ends.

Another adversary of the predominant trend in German jurisprudence

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[54] Engisch, "Der Begriff der Rechtslücke," in Festschrift für Wilhelm Sauer (1952), pp. 85 *et seq.* Engisch denies the power of the judge to render decisions contrary to positive law. *Id.*, p. 93.

[55] *Op. cit. supra* note 52, pp. 44 *et seq.*

[56] Id., p. 67 *et seq.*

[57] Engisch, "Der Rechtsfreie Raum," 108 Zeitschrift für die gesamte Strafrechtswissenschaft (1952) 385 *et seq.*

[58] *Op. cit. supra* note 52, pp. 110 *et seq.*

[59] Welzel, Naturrecht und materiale Gerechtigkeit (1951), pp. 195–198.

[60] *Id.*, p. 196.

[61] *Id.*, p. 198.

is Professor Eberhard Schmidt of the University of Heidelberg. In an essay entitled "Statute and Judge: Regarding the Merits and Demerits of Positivism,"[62] he voices strong support of Welzel's natural-law critique. It is his opinion that there exist no self-evident legal principles of a "supreme" character, like those which Coing believed to have brought to light, and that all endeavors to work out an ethical system of universal validity must be regarded as having failed. This does not mean, however, that we have to embrace a resigned positivism. The possibility of "statutory wrong" to him is an unshakeable truth; a monstrous injustice prescribed by law cannot bind the judge.[63] But this does not follow from any concept of "natural law" or "universal moral law," but is a consequence of our particular "living morality" and our Christian conscience.[64] Schmidt advocates that these basic principles of our morality should, as much as possible, be reduced to statutory form in order to vouchsafe the certainty of the law and to give articulate and authoritative expression, in the form of legislation, to the postulates of contemporary justice. He concludes his essay with the words: "Positivism is dead, long live positivism."[65]

VI

It would be premature to venture a prediction on whether the antipositivistic attitude dominant in German jurisprudence today will turn out to be of a merely temporary and ephemeral character, or whether it will consolidate itself as a lasting reorientation of legal-philosophical thinking. Professor Hans Thieme in 1947 stated his firm belief that

"we are experiencing today merely the beginning of the dawn, but a new day of the natural law will surely arise. . . . Everywhere positivism is in retreat."[66]

Professor Max Kaser, on the other hand, although generally in sympathy with Professor Thieme's hopes, expressed some scepticism as to the likelihood of their final realization:

"it is true that the palpable abuses of legislative power which we have experienced more than once in our age have brought us to the clear realization that, behind the norms imposed by the state, there are principles of law which enjoy a higher authority than the former, and the problematical character of

[62] Schmidt, Gesetz und Richter: Vom Wert und Unwert des Positivismus (1952).

[63] *Id.*, p. 16.

[64] *Id.*, p. 19.

[65] *Id.*, p. 22. Attention may also be called to Beyer's Rechtsphilosophische Besinnung: Eine Warnung vor der ewigen Wiederkehr des Naturrechts (1947).

[66] Thieme, Das Naturrecht und die Europäische Privatrechtsgeschichte (1947), p. 51.

'legality' has thereby been strikingly impressed upon our consciousness. Since, however, legislation has expeditiously been enacted to repeal the obnoxious commands and to bring the statute law again into harmony with a healthy sense of justice, the interest in this fundamental problem is threatening to abate."[67]

We do not know whether Professor Thieme would have revised his forecast if he had made it in 1954 rather than in 1947, since the countertrend described above has made considerable gains in recent years. However, the real strength of this opposition cannot as yet be safely ascertained. The events taking place in Eastern Germany, where many injustices are being committed under the cloak of external "legality,"[68] may serve to keep alive the West German antagonism to a positivistic legal philosophy which excises the question of the legitimate contents of legal regulation from the field of jurisprudence and relegates it to the realm of speculative philosophy. Many thinking Germans realize that the struggle between positivism and antipositivism in jurisprudence, far from being the exclusive concern of theorists and armchair jurists, is strongly related to the highly practical question whether we want to educate human beings endowed with a moral sense, a feeling of personal responsibility, and a critical judgment, or whether we prefer to produce the "robot" man of a collectivistic age who will render slavish and unquestioning obedience to whatever authority is capable of excercising power over him.

On the other hand, those opposing the prevailing trend have a valid message to transmit to us when they point out the dangers to which a legal system is exposed by a natural-law philosophy carried to extremes. Such a philosophy, if it opens up any legal enactment of the state to an independent reappraisal by private individuals or judges as to its "morality" or "justice," may remove the very bottom from an institution one of whose chief values lies in its stability and inviolability. Radbruch, realizing the danger, sought to limit the right of resistance against unjust laws to extreme situations.[69] It might be added that the problem usually becomes acute only under conditions where all possibilities for legalized

[67] Kaser, "Wege und Ziele der deutschen Zivilrechtswissenschaft," Studi in Memoria di Paolo Koschaker, Vol. I, p. 550 (1953).

[68] This term, in the sense in which it is used in Soviet jurisdictions, means imposition of commands and punishment according to general laws rather than through administrative fiat. See Schöneburg, "Formen und Bedeutung der Gesetzlichkeit als einer Methode in der Führung des Klassenkampfs," Neue Justiz, 1953, p. 290; Rosenthal-Lange-Blomeyer, Die Justiz in der Sowjetischen Zone (1952), pp. 33 *et seq.*

[69] See also the balanced and judicious comments on this problem by Del Vecchio, Justice, ed. by Campbell (1953), pp. 157–158. *Cf.* also Coing, Grundzüge der Rechtsphilosophie, p. 168: "It is implicit in the nature of law as an order that active resistance can be justified only in extreme cases."

redress or genuine judicial review have been cut off and where a tyrannical power unresponsive to the wishes of the people has stifled all chances for a rational adjustment between the interests of the rulers and the community's sense of justice. The best guaranty against the occurrence of insoluble conflicts between law and justice lies in the preservation of an open and tolerant polity whose legislators maintain close contact with the demands and needs of the people, while an independent judiciary stands guard over the rights of individuals, groups, or minorities who may be in need of legal protection.

Comments

TWENTY-FIFTH ANNIVERSARY OF THE ITALIAN INSTITUTE OF LEGISLATIVE STUDIES

On the occasion of the twenty-fifth anniversary of the establishment of the Italian Institute of Legislative Studies (*Istituto di Studi Legislativi*) in Rome, its director, Professor Salvatore Galgano, has rendered a report of its activities. As is indicated by its name, the Institute was founded in order to prepare legislation, both for Italy and for combinations of nations planning to engage in uniform legislation on an international scale. The purposes of the Institute seem to be similar to those of a law revision commission or a legislative reference service. However, the routine work of legislative preparation and draftsmanship has always been done in Italy by the special staffs of the central government departments, whose members have traditionally maintained high standards of draftsmen's skills. The Institute has thus been meant to go beyond the scope of what can be expected of routine legislative preparation, and to embark on more specialized research. In its program, the Institute envisages extensive statistical and other factual inquiries in preparation of legislation to be carried on systematically by people trained in the techniques of social research. These studies of legislative needs and the prospective consequences of intended legislative measures are, according to the program, to be supplemented by historical studies and, above all, by systematic observation of ideas developed and experiences from abroad. In the actual work of the Institute, emphasis has been placed upon this latter aspect of the program. As a matter of fact, the Institute has predominantly been one of comparative law, and through the international co-operation which has been organized by its Secretary General, Professor Galgano, and through its publications, the Institute has become significant not only for Italy but for the world at large.

Outside of Italy, the Institute has indeed become known primarily through its publications, among which the central place is occupied by the *Annuario di diritto comparato e di studi legislativi* (Yearbook of Comparative Law and Legislative Studies). In its first years, this yearbook was divided into four parts: leading articles, legislative reports, case law, and reports on legal writings. From 1932 on, separate periodicals have been published for the three last named sections.

The leading articles have usually been grouped as symposia dealing with pending legislative matters, and quite particularly with those revisions of the Italian Codes which were carried on in recent decades. Italian and foreign scholars were invited to scrutinize the draft codes and to publish their observations. The results of this unique method of using internationally known experts

from many countries has clearly contributed to the high qualities of the new codes of Italy (Civil Code of 1942; following the model of Switzerland, this Code covers both private and commercial law; Code of Civil Procedure of 1940; Criminal Code of 1930, and Code of Criminal Procedure of 1930). Extensive symposia were also devoted to the draft of a Uniform Code of Obligations for Italy and France. Through another group of articles, critical information is currently provided on important legislation of foreign countries.

In its extensive Repertory of world legislation (*Repertorio di legislazione mondiale*) the Institute reports currently the titles of all legislative enactments, including decrees, ordinances, etc., from 130 jurisdictions the world over, that is, from Albania to Venezuela, including such legislative units as the component states of Austria, Germany, Switzerland, and other federal nations, or of colonial jurisdictions, such as French Equatorial Africa, the Falkland Islands or the Federated Malay States.

Current case law is covered by no less than three periodicals, namely: *Giurisprudenza comparata di diritto internazionale privato* (Comparative Case Law in the Field of Conflict of Laws), *Giurisprudenza comparata di diritto civile* (Comparative Case Law in the Field of Private Law), and *Giurisprudenza comparata di diritto commerciale, diritto marittimo, diritto aereo, diritto industriale e diritto d'autore* (Comparative Case Law in the Fields of Commercial Law, Maritime Law, Air Law, Patents, Trademarks and Copyrights). In each of these periodicals, the important decisions of every year are reported in the original texts, to which summaries are added in three other languages, so that for each decision information is available in Italian, English, French, and German. Each of the leading cases is accompanied by extensive annotations, which are frequently written by a scholar from a country other than that of the origin of the decision. For many cases, annotations are provided by scholars from two countries. These collections of cases and annotations of the highest scholarly standing are a unique treasure-house of comparative law.

The vast scope of the Institute's activities is indicated by the following figures:

During the first twenty-five years of its existence, the Institute has published 91 volumes of the *Annuario* and its accompanying sister periodicals and, in addition, 24 volumes containing all the decisions rendered by the Italian Supreme Court, many of which are accompanied by extensive annotations. In these volumes there are covered 10,634 decisions, of which 2,573 are Italian and 7,061 foreign. 7,605 decisions are accompanied by annotations, of which 2,425 are by Italian and 3,187 by foreign scholars.

These figures are all the more impressive as the activities of the Institute were seriously affected, and for a time completely interrupted, by the war. Immediately after the cessation of hostilities, the activities of the Institute have been resumed.

To these facts as stated by the Secretary General of the Institute, one has to add the observation that practically all this work has been organized and

carried on by its Secretary General, Professor Galgano. Through his learning, his enthusiasm, his energy, his indefatigable labor, he has produced a work of most impressive scope and admirable qualities. Italy can well be proud of this achievement, the uninterrupted continuation of which is a necessity for all serious scholars of comparative law.

MAX RHEINSTEIN*

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LEGAL DEVELOPMENTS IN INDONESIA

Indonesia is one of the great European colonial possessions in Asia to achieve national independence within the last decade. Just as in India and Burma, so in Indonesia, World War II had a great influence on the movement for independence, and the establishment of a national state. In Indonesia this influence was, if anything, greater than elsewhere, as the country fell to the Japanese early in the war and remained under their occupation until after the end of the war. Yet in contrast to both India and Burma, Indonesia did not gain independence without prolonged military action against colonial rule. Fighting against the military forces of the Netherlands, which tried to re-establish its regime after the end of World War II, continued in Indonesia until 1949. It was mainly due to the patient work of the United Nations Commission for Indonesia that a Dutch-Indonesian round-table conference met and finally agreed on the transfer of sovereignty from the Netherlands to the new Indonesian state.[1] This took effect from December 27, 1949.

Indonesia has thus been in existence as a sovereign state for little more than four years. The following survey intends to trace the major changes which nationhood has brought to Indonesia in the field of law, as compared with the prewar position. Obviously, the most important changes have taken place in the constitutional sphere. On the other hand, while the prewar pattern of civil and criminal law, with its "dualism" of European and of indigenous, customary law (the "Adat law") has in principle been taken over at least for the time being, there have been important limitations to this pattern. The administration of justice, the system of courts and procedure, have been largely unified and simplified. At the same time, the place which Adat law is finally to occupy in the legal system of the Indonesian Republic has emerged as one of the most important questions facing the Indonesian lawgiver today.[2]

[1] For a detailed study of the various stages of Indonesia's fight for independence, see G. McT. Kahin, Nationalism and Revolution in Indonesia (Cornell Univ. Press, 1952).

[2] There is a scarcity of English-language material on the Indonesian legal system. Probably the best study of the prewar system is by Professor A. A. Schiller in his part of the Introduction to the English edition of Professor ter Haar's Adat Law in Indonesia (New

Constitutional Position

The present constitution of Indonesia dates from August 15, 1950.[3] Under it, the Indonesian Republic is organised as a unitary state. In the words of Article 1 of the constitution, "the independent and sovereign Republic of Indonesia is a democratic state of unitary structure, governed by justice." This unitary character distinguishes the Republic under the constitution of August, 1950, from the Republic under the earlier constitution of December 27, 1949. Under the latter, the designation of the Republic was that of the "United States of Indonesia," and Article 1 expressly described the state structure as "federal structure." The Republic of the United States of Indonesia was composed, according to Article 2 of the 1949 constitution, of 16 member states and autonomous regions, first and foremost among the states being the Indonesian Republic (old style). Most of the other states and all the autonomous regions had been sponsored by the Dutch in an effort to counteract the influence of the old Indonesian Republic.[4] The federal constitution provided for a bicameral legislature, consisting of a house of representatives as well as a senate (the latter a body of government appointees from the states and autonomous regions). Under Article 122, the house of representatives could compel neither the cabinet nor individual ministers to resign.

By contrast, under the new unitary constitution of August, 1950, the legislature is unicameral, consisting of a house of representatives only. Furthermore, the new constitution establishes the principle of parliamentary responsibility of cabinet and ministers. Apart from these fundamental changes, many of the provisions of the federal 1949 constitution have been left unchanged in the unitary 1950 constitution. In the field of legislative power, the provision that the government has authority to enact emergency laws "for such matters which demand immediate action on account of urgent circumstances"[5] has proved of great importance; ultimate sanction of emergency laws by parliament is necessary but has usually been forthcoming. In fact, some of the most important enactments in the past four years were passed as emergency laws.

Furthermore, like the 1949 constitution, the present constitution is merely

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York, 1948). De Kat Angelino's Colonial Policy, Vol. II, The Dutch East Indies (Hague, 1931) has a useful chapter dealing with the administration of justice. On the postwar system all the material is in Dutch or Indonesian. See, in particular, Professor W. L. G. Lemaire's Het Recht in Indonesie (Hague & Bandung, 1952), and the monthly Mededelingen van het Documentatiebureau voor Overzees Recht in Leyden.

[3] It was proclaimed on August 15, 1950, but did not come into force until two days later, to coincide with the fifth anniversary of the Indonesian Republic (old style).

[4] The Indonesian Republic, as proclaimed in 1945, and later acknowledged as having authority over Java and Sumatra, will be referred to as the Republic (old style); it has sometimes been called the Republic of Djogja, after its seat of government. By contrast, the Republic of Indonesia, as constituted under the 1950 constitution, will be referred to as the Republic (new style), or the Indonesian Republic simply.

[5] Art. 139/140, Constitution of 1949; Art. 96/97, Constitution of 1950.

provisional. It is to be submitted to and ratified, with or without amendments, by a constituent assembly. This assembly still waits election. Since the passing of the Election Act (No. 7 of 1953) in April 1953, the legal framework is now in existence for the registration of voters and the carrying out of the country's first nation-wide popular elections. These are to be held for two assemblies: the special constituent assembly, and the house of representatives. (The present house of representatives consists mainly of government appointees.) In view of technical difficulties involved in the organisation of elections throughout the widely scattered archipelago, the elections are not expected to be completed before 1955. Considering the probability of prolonged deliberations by the future constituent assembly on certain aspects of the constitution, the present "provisional" constitution of August 15, 1950, may thus remain operative in its present form for years to come.

Principle of Continuity

Apart from constitutional provisions such as those mentioned above, the constitution contains with regard to most matters only general principles, and leaves their detailed elaboration to special enactments.[6] Few of these have been passed so far. The general principle of continuity of existing law is therefore of great importance. This principle is expressed in Article 142 of the 1950 constitution, which reads: "Regulations by law and administrative provisions existing on the 17th August 1950 remain in force unchanged as regulations and provisions of the Republic of Indonesia so long and insofar as they have not been withdrawn, supplemented or amended by legislation and administrative provisions in virtue of this Constitution." This provision stipulating the continued validity of the law existing at the coming into force of the present constitution has to be linked with similar provisions in constitutions preceding the present one. In this way, the basis will become apparent for the continued validity of the bulk of the prewar Netherlands-Indies legislation in many fields of law. The federal constitution of December, 1949, setting up the Republic of the United States of Indonesia, contained in Article 192, paragraph 1, a provision identical with Article 142 of the present constitution, while paragraph 2 made the reservation that the general principle of continued validity of existing legislation applied only insofar as such legislation is not incompatible with the provisions of the Charter of Transfer of Sovereignty and other agreements concluded with the Netherlands at that time. Of the member states and autonomous regions constituting the United States of Indonesia by far the most important was the Republic of Indonesia (old style), which as early as 1946 had been recognised as exercising de facto authority in Java and Sumatra, the archipelago's two most important islands. This "old" Republic was proclaimed

[6] With regard to the administration of justice, see in particular Section III of the Constitution, "Judicature," Art. 101–108.

a few days after Japan's surrender to the Allies, on August 17, 1945. Its constitution, a brief document, was promulgated late in August.[7] By presidential decree (No. 2 of 1945) issued on October 10, 1945, it was decreed with regard to the validity of pre-Republican law, that the "law in force on the 17th August 1945 should remain in force as far as it is not in conflict with the constitution, or replaced by new legislation." The law in force on August 17, 1945, was substantially the prewar law. However, since the surrender of the Netherlands forces in the Netherlands East Indies to the Japanese early in March, 1942, the Japanese occupation authorities had introduced some legal changes.[8]

In the parts of the Indonesian archipelago outside the area of the Republic (old style), Netherlands Indies authority was re-established from 1946 on, and in the following years gradually transferred to semi-independent states and regions.[9] In these areas the validity of Netherlands Indies prewar law was therefore never in doubt. On the other hand, the complex constitutional history of the various parts of Indonesia from the proclamation of the Republic (old style) in August, 1945, to the establishment of the Republic (new style) five years later resulted in a confusing diversity of law-making bodies. Yet, whatever the importance of legislation by the numerous states and autonomous regions recognised at the time of the transfer of sovereignty in December, 1949, would have been, had the federal structure of the Republic—the then-formed United States of Indonesia—been maintained, this question became hypothetical with the establishment of the new unitary Republic. In the first three months, all but three of the federal member states were incorporated into the Republic (old style) at their own request, and the law of the Republic (old style) was declared by statute (No. 1 of 1950) to apply in the newly incorporated states and regions.[10] For the years 1945 to 1949, the legislation of the Republic (old style) has therefore become the major source of statutory law in Indonesia.[11] During the less than eight months of its existence (December 1949–August 1950), the Republic of the United States of Indonesia was, owing to the importance of the federal legislative powers, the chief source of

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[7] Kahin, *loc. cit.*, p. 138. Text of Constitution in Koesnodiprodjo's collection of Indonesian laws and regulations for 1945, p. 6 *et seq.*

[8] Doubts have been expressed whether decrees of the occupying power could, under the rules of public international law, be validly declared to remain in force after the surrender of the occupying power. (Lemaire, *op. cit.*, p. 238)

[9] From 1947 on, the Netherlands Indies authorities also supported the establishment of such states and autonomous regions in the territory recognised as under the Republic's authority, viz. Sumatra and Java.

[10] Laws previously in force in these incorporated territories were to be no longer valid, if in conflict with the laws of the Republic. However, the statute provided that even if they were in conflict, the minister could allow their continued validity.

[11] Under the federal Republic of the U.S. of Indonesia, the Republic (old style) remained in existence as a member state from December 1949 until August 1950, and also during that period it passed some important legislation in those fields left to member states under the federal constitution.

law-making in Indonesia; since the establishment of the unitary new Indonesian Republic in August, 1950, the problem of the previous variety of sources of legislation no longer exists.

Prewar Dualism in the Law

From an early period in the history of Dutch rule in Indonesia, it was a matter of principle that there should be a system of law in Indonesia based on that in force in the Netherlands. However, this law was not applied to the indigenous Indonesians; the "natives," as they were referred to in the legislation, were to be left under their own law. The law based on the Dutch metropolitan model was to apply only or mainly to Europeans living in Indonesia. This principle of dualism in the law operated not only in the substantive law, but also in the organisation of courts and their procedure. For a time, strong tendencies were at work to limit and eventually abandon the principle. However, from the late 1920's an improved and more progressive dualistic system which has aptly been referred to as "enlightened dualism," emerged.[12]

The legislation of 1848 divided the population of Indonesia into four groups, namely: Europeans; Persons on the same footing as Europeans; Natives; Persons on the same footing as natives. There was in fact little difference between the first two groups, and by 1920 the groups had been reduced to three, the last group being defined more clearly. As set out in Article 163 of the Constitution of 1925, the new division was into: Europeans, Natives, Foreign Orientals.

The classification "European" covered the nationals not only of European countries, but also of all those countries with a system of family law based on principles similar to that of the Netherlands.[13] Among Asian people, not only Japanese but also, for example, Thai nationals, were thus classed as Europeans. The second group, that of "Natives," comprised all those indigenous Indonesians who had not gone over, as set out later, into one of the other groups. Furthermore, it was provided that those following the Christian faith might have their legal status regulated by special legislation. The group of "foreign Orientals," finally, covered primarily the Chinese, Arabs, and Indians, insofar as they had not transferred to another group, or were subject to special regulation on account of their Christian faith.

For the first group, the "Europeans," codes modelled on those of the Netherlands had been introduced in the Netherlands Indies from the middle of the nineteenth century on, the three important codes dealing with private law (Civil Code, Commercial Code, Code of Civil Procedure) dating from 1848. The third group, the "Foreign Orientals," was gradually made subject to the European civil and commercial codes, except in the fields of family law and

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[12] Schiller, *op. cit.*, p. 13.

[13] Since the time of Napoleon, when the major French codes were introduced into Holland, Dutch law followed French law in most spheres of law.

the law of intestate succession, a process which began as early as 1855 and was completed by 1925; the fields of law to which the codes did not apply were governed partly by Adat law, the customary law of the communities concerned, partly by special regulations. It was the second group, the "Natives," or indigenous Indonesians, who finally maintained their own Adat law in most fields of law. In the early part of this century unification and codification of the Adat law along European lines appeared to the Netherlands Indies government as the most appropriate means of adjusting Indonesian life to the conditions of the modern world. A new Criminal Code and a Police Court and Procedure Code for all groups of the population were passed. However, a draft Civil Code presented in the early 1920's failed of acceptance, principally as the result of criticism by Professor van Vollenhoven, the great Adat law expert. The defeat of this codification led to a reversal of the government policy. As a result, the last fifteen years preceding the fall of the Indies to Japan (1927–1942) were marked by a return to a policy of dualism, as far as the indigenous Indonesian group was concerned, a dualism of an enlightened and positive kind.

Members of both the native and the foreign Oriental groups were free to enter the European group, by "voluntary acceptance" of European law. The regulation concerned[14] specified three types of such acceptance: general acceptance, partial acceptance, and acceptance for a particular transaction. General acceptance had the consequence that the person concerned and his family were in all respects tied to the civil and commercial law applicable to the European group; this general acceptance had to be made by declaration before the local administrative authorities and publication in the government gazette and newspapers. It proved unpopular in practice. Partial acceptance of European law by a native Indonesian placed him in the same category as a foreign Oriental with regard to the application of European law; he became subject to the Civil Code (except family law and intestate succession law) and to the Commercial Code, as well as the Bankruptcy Ordinance. Apart from the three types of voluntary acceptance of European law, the regulation mentioned a fourth type, which may be termed an implied acceptance. It occurred whenever a native Indonesian entered a legal transaction unknown to his Adat law and regulated by European law only. By way of example may be mentioned the entering into a contract of insurance, or into a partnership under a firm name. It was common to all cases of voluntary or implied acceptance of European law that the person concerned did not thereby change his status in the field of public law; he remained a member of his population group and subject to the political rights and duties of that group.

While voluntary acceptance of European law thus enabled non-Europeans to become, in varying degrees, members of the European law group, prewar Netherlands Indies law provided basically two systems of law for the three population groups: codes modelled on Dutch legislation for the European

[14] See Netherlands Indies Staatsblad 1917, No. 12. Schiller, *op. cit.*, pp. 35–37.

group, as well as (apart from family and intestate succession law) the foreign Oriental group, while Adat law was the system for the native Indonesians.

Administration of Justice

(a) *Prewar Position.* The prewar Netherlands Indies consisted partly of directly governed territory, and partly of indirectly governed territory. The former comprised most of Java and Sumatra, but less than 40% of the rest of the archipelago. The latter consisted of a great number of self-governing territories (the *Zelfbesturende Landschappen*) mainly principalities and sultanates. Their relationship to the Dutch was based in each case on political agreement, a "Long Contract" (in case of the major territories), setting out rights and duties in full, or a "Short Declaration," subjecting the ruler concerned to standardised Self-Government Regulations. Most of these self-governing territories had retained their own Adat law which they administered in their own courts; in those territories where the Adat law had largely disappeared, it was successfully brought back into operation shortly before the war, in the course of the then current official Dutch policy of revitalising the Adat law. On the other hand, the Dutch insisted on certain limitations to this so-called "Native Justice in self-governing territories" (*Landschapsrechtspraak*). Generally, it applied only within the particular territory, and with regard to native residents of the territory; furthermore, certain matters were placed exclusively under Netherlands Indies government courts.[15]

"Native Justice" existed also in directly governed territory. In some parts, especially those incorporated in more recent times in the directly governed territory, the population had always been left in the enjoyment of its own justice; the Constitutions of 1854 and of 1925 made special reference to and thereby sanctioned it. Since 1932, a special statute dealing with "Native Justice in directly governed territory" (*Inheemse Rechtspraak*) has been in operation. It dealt with the old Village Courts (*Dorpsrechtspraak*), Religious Courts (*Godsdienstige Rechtspraak*), and certain other Adat courts. Justiciable before these courts were not only indigenous residents of the area concerned, but—in this case going beyond the limits of Native Justice in self-governing territories—all indigenous persons, always within the limits of specified exemptions in favor of government courts. The statute also dealt with the law applicable, which was generally the Adat law of the law area so far as it was not in conflict with an appended list of enactments and sections of the European codes.

Apart from the two types of Native Justice, prewar Netherlands Indies had its separate system of Government Justice. In importance, it ranked first. In conformity with the prevalent dualistic policy, it provided one hierarchy of courts for the European group, and another for the native group.

For the persons subject to European law, the lowest government court was the Residency Court for minor civil and criminal matters (*Residentiegerecht*).

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[15] Lemaire, *op. cit.*, pp. 231–2, with references.

The normal court of first instance, and also court of appeal against judgments of the Residency Court, was the Superior Court (*Raad van Justitie*). Above the latter was the Supreme Court, (*Hooggerechtshof*), which acted as a court of appeal from the *Raad van Justitie* and also as a court of cassation. The procedure applicable before these courts was that of the Codes of Civil and of Criminal Procedure.[16] In certain exceptional cases a "*forum privilegiatum*" under a European judge would hear cases against persons of the native law group, e.g. sultans and chiefs and their families.[17]

For persons of the native law group, the hierarchy of government courts in Java and Madura was as follows.[18] There were two "lower courts," the District Court (*Districtsgerecht*) for the lower bracket of minor civil claims (up to 20 guilders in value) and petty criminal offences, and the Regency Court (*Regentschapsgerecht*) as court of appeal from the former, and as court of first instance for the upper bracket of minor civil claims (between 20 and 50 guilders), and certain criminal offences. Both these lower courts were constituted by the highest administrative officer of the area, the District and Regency respectively, who might call in other native persons of standing as advisers. The normal government court of first instance for native Indonesians was the Land Court (*Landraad*); here the bench consisted of a legally trained officer as presiding judge, and certain native high officials as members of the court. From the decisions of the *Landraad* appeal lay to the *Raad van Justitie*; in civil cases, the appeal went to the third Chamber of the *Raad van Justitie* at Batavia, which was composed of jurists specially trained in Adat law.[19]

Finally, village courts and religious courts existed also as part of local custom, in directly governed territory with Government Justice.

In brief, the prewar pattern of administration of justice in the Netherlands Indies provided:

(a) One system of courts for Europeans and other persons subject to European law.

(b) A separate system of courts for native persons, either as (i) Government Justice, or (ii) Native Justice (in self-governing territories or in directly-ruled territory).

(b) *Present Position.* The first great change in the organisation of courts came during the occupation of Indonesia by the Japanese during World War II. Among measures of lasting importance taken by them were the abolition of the hierarchy of European courts, and a reorganisation of the former *Landraad* as the normal court of first instance for all population groups.[20] The dualis-

[16] These codes applied to Java and Madura. For the other territories, see Rechtsreglement Buitengewesten of 1927.

[17] For details see André de la Porte, Recht en Rechtsbedeeling in Ned. Indie (2nd ed. 1933) pp. 87–89.

[18] In the islands outside Java and Madura, the names of the indigenous courts of government justice differed from the above; see references in Schiller, *op. cit.*, p. 17.

[19] The Chinese came in criminal matters before the indigenous courts, in civil matters before the European courts.

[20] There was only one privileged group exempted from the Indonesian courts, the Japanese.

tic system of administration of justice disappeared in principle with the establishment of the Republic.[21] Since the transfer of sovereignty to the Indonesians, two statutes dealing with the organisation of courts and procedure have been promulgated: the Law on the new Supreme Court of Indonesia (No. 30 of 1950); and the Emergency Law (No. 1 of 1951) on "provisional measures for furthering the unity in the judicial organisation, jurisdiction and procedure of the civil (i.e. nonmilitary) juridical organs."[22] On the basis of this legislation, and on the principle of the general validity, unless specifically abrogated, of prewar law, the following picture of the present organisation of courts and procedure in Indonesia emerges.

The normal court of first instance is now the Land Court (in Indonesian *Pengadilan Negeri*, in Dutch *Landraad*). However, in contrast to prewar times, this court consists of a single judge, provided that in certain matters the President of the Superior Court may order the bench of the Land Court to consist of three judges. The new Land Court is the ordinary court of first instance in all civil and criminal matters, with the exception of those which have been brought expressly under the competence of other courts.

Courts of second instance are the Superior Courts (in Indonesian *Pengadilan Tinggi*, in Dutch *Raad van Justitie* or *Appelraad*). Under the 1951 law, there are now four such courts: at Djakarta (prewar Batavia), Surabaya, Medan, and Makassar. These Superior Courts act as courts of appeal from judgments of the Land Courts in civil as well as criminal matters. By agreement between the parties, actions may also be brought before the Superior Court as the court of first instance. Finally, the Superior Courts decide jurisdictional disputes between lower courts within their area. If sitting as a court of appeal, the Superior Court consists of not less than three judges.

The Supreme Court (in Indonesian *Mahkamah Agung*) is the only court whose establishment and functions are dealt with by the Constitution itself. Further provisions on this court are contained in the above-mentioned law of 1950. The new Supreme Court of Indonesia differs in several important aspects from the prewar Supreme Court of the Netherlands Indies (the *Hooggerechtshof*). Firstly, its jurisdiction in "cassation" has been extended.[23] It is now provided that cassation lies not only (as for the the prewar Supreme Court) for violation of a particular rule of the written law (a statute, regulation, ordinance) but

[21] Under the Republic's constitution, law throughout the whole of the territory of the Republic is to be applied "in the name of the Republic." This contrasts with the constitutional rule in Dutch times where justice "in the name of the King" (of the Netherlands) was applied only in the government courts.

[22] The 1951 law was clearly thought of as merely the forerunner of a statute, or code, dealing with the whole of the organisation, jurisdiction, and procedure of the courts. However, the writer is not aware of any new statute superseding the 1951 law.

[23] "*Cassatie*," or cassation, is based, via the Dutch Code of Procedure, on the model of the French Code of Procedure. In cassation the court does not rehear the case, but merely decides whether the lower court, in applying the law to the facts as that court found them, applied the law rightly or not. Cassation lies, under the new Indonesian law, not only at the instance of the parties, but also at that of the *Djaksa Agung* (chief state prosecutor).

for any violation of the law. This means that a matter can now, in the last resort, be brought before the Supreme Court on the ground of the wrong application of a rule of Adat law; the full extent of this change becomes apparent if it is realised that Adat law governs most of the legal relations of the native Indonesian population.

Another innovation is that, under the Constitution of the Indonesian Republic, the Supreme Court is available to the government for advice on legal questions. Certain criminal matters involving high state officers are brought before the Supreme Court in first and final instance. The Supreme Court bench consists of at least three judges.

While the procedure before the new Supreme Court is regulated by the Law of 1950, the procedure before the new courts of first instance (*Pengadilan Negeri*) and of appeal (*Pengadilan Tinggi*) is substantially that existing in 1941 before the equivalent native courts of Government Justice. This means, for Java and Madura, the "Revised Indonesian Regulations" (*Herziene Inlandsch Reglement*) of 1941, and for the other areas the "Legal Regulations for the Outer Territories" (*Rechtsreglement Buitengewesten*) of 1927. According to Article 5 of the Emergency Law of 1951, both of these are in force in the form they had in the Indonesian Republic (old style), i.e. including the amendments introduced during the Japanese occupation and later during the existence of the old Republic (1945–1950). Compared with the prewar procedure before the European courts in Indonesia, the procedure before the native courts was always marked by greater simplicity, lack of formalism, and a more paternal attitude of the court. These aspects are now even more marked. Especially in the courts of first instance, the judges take a very active part in the proceedings.[24]

Apart from the hierarchy of government courts (*Pengadilan Negeri, Pengadilan Tinggi, Mahkamah Agung*), there still exists today an admittedly everdwindling area of Native Justice, mainly in some of the former self-governing territories. This relic of the prewar dualistic system of government administration was abolished by the Republic (old style) for Java and Sumatra in 1947. The Emergency Law of 1951 of the present Republic laid down the general principle that Native Justice—then still existing in East Indonesia and West Borneo—was to be abolished gradually, at a time to be fixed by the minister of justice. In the exercise of this power, the minister abolished in the course of 1952 the old system of Native Justice on Bali, and in the province of Celebes,[25] and in 1953 on Lombok. Government courts have now been set up throughout

[24] Lemaire noted (*op. cit.*, p. 262) that already in prewar times the rules of procedure laid down in these Regulations were often greatly moulded by the courts, in order to give full effect to the substantive Adat law. The writer was amazed during his visits in 1953 to various courts of first instance in Indonesia at the delightful lack of formalism on the part of the judges.

[25] See Indonesian Suppt. Gvt. Gazette (Tambahan Lembaran Negara), Nos. 231, 276, and 462.

these islands, replacing the old Adat courts. Doubtless, the abolition of the remnants of Native Justice is proceeding so gradually because of the limited number of Indonesian trained judges available for the staffing of new government courts.[26]

Village Courts within the restricted sphere they were allowed in the old directly-governed territory with government administration of justice appear to remain unaffected by the reorganisation of justice.[27]

Of greater importance than these village courts are the Religious Courts. They have been expressly exempted from the abolition of Native Justice. In many areas with government administration of justice (Java and Madura, parts of Borneo), the competence of and procedure before the religious courts were fully regulated by statute; in the other areas they were subject to Adat public law. There has apparently been no change in this field so far. In Java and Madura, Priest Courts are the courts of first instance in matters coming before the religious courts (mainly marriage and divorce, guardianship, religious foundations), with a Court for Islamic Affairs at Solo as court of appeal. The future of religious courts in the Indonesia of today appears to be closely linked with the Republic's political future. In a 1948 statute which was never put into operation, the Republic (old style) arranged for the taking over of religious justice by special "chambers for religious affairs" established at the Land Courts; these chambers were to consist of a judge as chairman, and two "experts in the Islamic religion" as members of the chamber. Present plans for the new Republic are said to run along similar lines.[28]

Present Place of Adat Law

The prewar division of the population into groups according to the law applicable to them continues, under the Indonesian Republic, to be decisive for the choice of substantive law. For the vast majority of Indonesians, i.e. all those who do not belong to the European or the foreign Oriental groups, this means that they are subject in principle to Adat law. However, even in the field of substantive law, considerable inroads on the Adat law have been made by legislation. Already before the war so much of the law applicable to Indonesians had been regulated by statute that it could be said that "the only significant field that remains to Adat law . . . is what is termed in Occidental legal phraseology 'civil law,' inclusive of the concept of 'commercial law.' "[29] Since the gradual abolition of Native Justice in recent years, this statement is

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[26] The only areas in which Native Justice in formerly self-governing territories (*Pengadilan Swapradja, Landschapsrechtspraak*), or in formerly directly-governed territory (*Pengadilan Adat, Inheemse Rechtspraak*) is today still in existence, are apparently West Borneo, the Moluccas, and the Small Sunda islands, with the exception of Bali and Lombok.

[27] Art. 1 par. 3 of Law No. 1 of 1951 leaves expressly unimpaired the functions of the "village conciliation judges."

[28] Lemaire, *op. cit.*, p. 243.

[29] Schiller, *op. cit.*, pp. 31–32.

even more justified. The rule of statute law at the expense of Adat law has been extended also into certain fields of private law, e.g. the law of associations and labor law.[30]

One of the great problems facing the future of Adat law in the twentieth century is the difficulty of establishing or "finding" it. Following the division of the people into numerous ethnic groups, their Adat law varies greatly. Although we know since the basic research work of the great Adat law scholars (especially van Vollenhoven and ter Haar) that there are certain principles of Adat law common throughout Indonesia, for all practical purposes the division of Adat law is into nineteen law areas (*Rechtskringe*). In prewar years planned efforts were made, under the guidance of the Batavia Law Faculty, to have the Adat law investigated and written up area by area. By 1941, these findings were published as textbooks for two areas, while preliminary reports were published from other areas.[31] There is urgent need for this work to be continued and completed according to its original plan.

Another scheme which was successfully started in prewar years and assisted in making Adat law known, was the regular publication of important judgments in the local law journal (the *Indisch Tijdschrift van het Recht*). Although Indonesia does not know any binding rule of precedent, "case law" began to become of growing importance for the knowledge and development of Adat law. After many years of silence, a new law journal (*Hukum*) has made its appearance, and it is to be hoped that it will rival its predecessor in the reporting of Adat case law.

If these two aids to the finding of Adat law—textbooks and law reports—are successfully developed, the chances for a successful survival of Adat "civil" law in the now sovereign and independent Indonesia will greatly improve. A serious handicap which is bound to continue for quite a number of years is the great shortage of Indonesian judges, which does not allow the individual judge to devote much time to the average Adat law matter.[32]

A problem which will have to be solved sooner or later concerns the appropriate law group for Indonesian businessmen and others in occupations tied up with a modern economic sphere. While the great majority of Indonesians are small peasants, craftsmen, or agricultural workers, living in villages or other rural communities, for whom Adat law is still the "living law," this can not be said of the growing number of Indonesians in cosmopolitan trading centres like Djakarta and Surabaya. They will be subject to European law if

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[30] For a list of these enactments, see Lemaire *op. cit.*, p. 256.

[31] The book on the Adat law of West Java is by Professor Supomo, President of the University of Indonesia, that on the Adat law of Central Java by Professor Djojodigoeno of the Gadjah Mada University (Djogjakarta) and Mr. Tirtawinata.

[32] Before the war the majority of the over 200 judges in Indonesia were Dutchmen. According to information given to the writer in Djakarta last year, there are no Dutchmen now in judicial positions in Indonesia. Early in 1953, the total number of judges, all of them Indonesians, was about 100.

they submit to it by "voluntary" or implied acceptance, as explained above. Apart from these cases, it is for the judge to say whether the person concerned was involved in "transactions with a European flavor" so that he will be treated according to European law. The uncertainty resulting from the legally doubtful position of this sector of the Indonesian community can probably only be overcome by legislation. Treatment of all businessmen according to the rules of European law will strengthen their sense of commercial responsibility, as they will then be subject—in case of failure—to proceedings in bankruptcy, an institution which is unknown to Adat law.

The present Constitution visualises the codification of Adat law, without however limiting the legislature in point of time. Article 102 states that, among other fields of law, "civil law and commercial law . . . are established by law in statutes unless the legislator deems it necessary to regulate some matters by special law." If past failures are to be avoided, systematic research into existing Adat law on the lines begun before the war ought to precede codification. There may be good chances for unification in some fields (land law), but generally codification will have to preserve the varying patterns of Adat law. Otherwise, it will cease to be the living law of the Indonesians, especially those in rural communities.

There is little enthusiasm in Indonesia for any wholesale adoption of a modern Western code for the whole population, following the example of countries such as Thailand and Turkey. The obvious reason is that Indonesia has such a code on its statute book, although perhaps not the most modern one. However, its operation has deliberately not been extended to the general population, whose mode of life is based on a community pattern which does not fit into Western code rules. In this regard, there is agreement between today's Republic and the prewar Netherlands Indies Government. Only one major political group favors the wholesale scrapping of Adat law and its replacement by a "new system of law." This is the Communist Party. However, its chances of electoral success in the coming elections are too remote to justify serious consideration of the type of Communist system it has in mind for Indonesia.[33]

J. LEYSER*

[33] As Mr. Sakirman, then chairman of the parliamentary group of the Indonesian Communist Party, told the writer: "On principle, the P.K.I. (Indonesian Communist Party) aims at a new system of law for Indonesia, a system which will no longer result in dividing one group from the other. . . . In the eyes of the P.K.I. the Adat law is no longer in conformity with the conditions of society and with the progressive modernisation of the Indonesian people."

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OBTAINING EVIDENCE IN SWITZERLAND FOR USE IN FOREIGN COURTS

American lawyers seeking to secure evidence from Switzerland have often experienced unexpected difficulties. Swiss clients were reluctant to testify or to produce needed documents, because they feared repercussions at home for having violated the Swiss secrecy laws, the primary purpose of which is to protect the private sphere of the individual and that of economic enterprise. They include privileged communications, business secrets, banking secrets, etc. In the early thirties, when the activities of fascists, nazis, and communists on Swiss soil became a serious menance to the sovereignty of Switzerland, laws were enacted to protect the security of the Federation, which made it a crime to furnish information on political, military, or economic matters to foreign powers or organizations. None of these laws interferes with regular court proceedings, because persons who disclose "secrets" in obedience to procedural requirements of a Swiss court will not be subject to criminal prosecution.[1]

In Switzerland, the duty to testify and to produce documents are duties towards the government to assist it in the exercise of its judicial powers.[2] The obtaining of evidence therefore is considered to be a function of the government, exercised exclusively by the courts. Any unauthorized person encroaching upon that function violates Article 271 of the Swiss Penal Code which subjects to criminal prosecution and punishment any person who on Swiss territory, without permission, takes on behalf of a foreign government any action (or aids in such action) which is within the competence of a Swiss government authority or government official.

On various occasions, American courts, in ignorance of the situation, have issued commissions to take depositions before a United States consul in Switzerland.[3] Evidently, the American parties concerned were unaware of the fact that the Swiss consider such an action a violation of their territorial sovereignty punishable under Article 271 of the Penal Code. It makes no difference that all parties volunteered, because the Federal Tribunal has held that the purpose of Article 271 is not the protection of private interests, but "public order and security." Offences against the territorial sovereignty, cannot become permissible by mere consent of private persons.[4] Furthermore, the Swiss do not accord to foreign consulates the right of proceeding to secure evidence. Such requests must be handled by the competent Swiss authorities.[5]

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[1] Art. 32 StGB (Schweizerisches Strafgesetzbuch).

[2] Bossard v. Bern Appellationshof, BGE (Bundesgerichtsentscheidung) 47 I 87, 96 (1921).

[3] See, for instance, U.S. Neckwear Corp. v. Sinaco Co., 176 Misc. 51; 26 NYS 2d 546 (1941); Bator v. Hungarian Commercial Bank of Pest, 90 NYS 2d 34 (1949); Goffin v. Esquire, 271 App. Div. 955, 67 NYS 639 (1947); motion for reargument denied, 70 NYS 2d, 135; motion for leave to appeal to the N.Y. Court of Appeals denied, 73 NYS 2d 636 (1947).

[4] Kämpfer v. Zurich, Staatsanwaltschaft, BGE 65 I 39 (1939).

[5] Geschäftsbericht des Bundesrats (1924), printed in Walther Burckhardt, Schweizerisches Bundesrecht, 1931, Vol. IV, No. 1674 III.

The proper procedure to obtain evidence in Switzerland is by way of letters rogatory, viz., under American legal concepts, a request by a court addressed to another court to take testimony of a certain witness residing within its jurisdiction. In Switzerland, such a request would come under the concept of "*Rechtshilfe*," or "*entr'aide judiciaire*," literally translated as "judicial assistance," which may extend to all kinds of procedural and investigative measures by the requested court for the purpose of assisting the requesting court in the conduct of a law suit.

It is customary for the courts to render judicial assistance. The Federal Tribunal considers this duty as between the cantons "a natural consequence of the community of the cantons created by the federal relationship,"[6] although the federal constitution is silent on that matter.[7] Most cantons provide for judicial assistance in their procedural codes, i.e., with respect to other cantons, and sometimes also with respect to foreign courts.[8] But while courts may render judicial assistance to foreign courts as a matter of general practice, there is no duty unless there is a treaty. In the absence of a treaty, judicial assistance remains within the discretion of the respective canton.[9] The basic treaty agreement is, of course, the Hague International Convention Concerning Civil Procedure of July 17, 1905, of which Switzerland is a member. In addition, Switzerland has a number of treaties regulating a simplified way of judicial assistance and execution of judgments.[10] Some treaties provide for direct communication between courts and prosecuting authorities of Switzerland and their counterparts in another country,[11] thereby eliminating the cumbersome way via diplomatic channels.

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[6] Bossard v. Bern Appellationshof, BGE 47 I 87, 95 (1921).

[7] Art. 61 of the Federal Constitution merely provides that civil judgments rendered by one canton should be executed in all other cantons. But other provisions concerning judicial assistance between the cantons can be found in other federal laws and in agreements between the cantons (Konkordat of 1912 and 1947). For details see Fleiner-Giacometti, Schweizerisches Bundesstaatsrecht, Zurich 1949, pp. 835, 861 *et seq.*

[8] For instance Bern ZPO 16 and 17; Zurich Gerichtsverfassungsgesetz §§ 126, 127, 128.

[9] Compare ZR (Blätter für zürcherische Rechtsprechung) 41 (1942) No. 134.

[10] A circular of the highest Zurich court, "Kreisschreiben der Verwaltungskommission des Zürcher Obergerichts," of May 2, 1949, lists all the treaties concerning recognition and execution of civil judgments, relief from the duty to advance costs, venue and judicial assistance in civil and criminal matters. ZR 48 (1949) No. 16, but see corrections in ZR 48 No. 157. (Also printed in 45 SJZ (Schweiz. Juristenzeitung) (1949) pp. 263, 315). The treaty between USA and Switzerland of Nov. 25, 1850 (US Stat. at Large, vol. 11 (1855–59) p. 588, Schweiz. Bundesblatt 1850 III pp. 731, 758) was first erroneously listed under I "Recognition and Execution of Civil Judgments." That treaty contains no such provisions (see corrections in ZR 48 No. 157). The Federal Tribunal has held that the Treaty of 1850 does not free nonresident U. S. citizens from the duty to advance court costs, Instant Index Corp. v. Tribunal cantonal vaudois, BGE 60 I 220 (1934). But in a recent decision it held that Art. I of the Treaty, providing for free access to the tribunals, entitles an American citizen, even though not residing in Switzerland, to sue as a poor person, Wolfe v. Frei et al., BGE 76 I 111 (1950).

[11] Such treaties exist with Germany, Austria, France, Italy, and Belgium; see Adolf F. Schnitzer, Handbuch des Internationalen Privatrechts, 3d ed., Basle 1950, vol. II p. 737; they have been temporarily suspended since the beginning of the war, 45 SJZ (1949) p. 264.

Since the United States is neither a party to the Hague Convention nor has a treaty regulating procedural problems with Switzerland, letters rogatory requiring the securing of evidence in Switzerland must be transmitted through diplomatic channels. They must be duly certified in order to establish their authenticity, and they must indicate the Swiss court having jurisdiction to comply with the request. The court at the place where the witness resides is competent.

In the absence of a treaty, the courts, in complying with requests from other cantons or from foreign governments for interrogation of witnesses or for other judicial action, will proceed according to their own procedural laws.[12]

There are twenty-five cantonal jurisdictions,[13] each having its own civil and criminal procedural codes. All the lower courts are cantonal courts. Switzerland, unlike the United States, does not have a dual system of state and federal courts. There is only one Federal Tribunal,[14] comparable to the United States Supreme Court. The largest part of its functions is its appellate jurisdiction over decisions of the cantonal courts. It acts as sole and last resort only in a few instances enumerated in the Federal Constitution[15] and the Federal Law concerning the Organization of the Judiciary of December 16, 1943.[16] The procedure before the Federal Tribunal is regulated by the Federal Civil Procedure Act of December 4, 1947[17] and by the Federal Criminal Procedure Act of June 15, 1934.[18]

The type of persons who may refuse testimony and the grounds on which they may do so vary in the different jurisdictions. These categories exceed those in the United States, because the Swiss laws protect the individual and his private sphere to a far greater extent than do the laws of the United States. In general, it may be said that spouses and close relatives of the parties, especially of a defendant in criminal proceedings, will not be forced to testify, and that testimony may be refused when it tends to incriminate or publicly disgrace the witness, his spouse, or certain specified close relatives. Details vary in the procedural codes of the cantons, as, for instance, with respect to the degree of relationship within which testimony may be refused on the ground of close

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[12] Bossard v. Bern, Appellationshof, BGE 47 I 87 (1921); Decision of August 7, 1945, in re Staatsanwaltschaft des Kantons Zürich v. Staatsanwaltschaft des Kantons Luzern, BGE 71 IV 170, 174 (1945); Bern, Appellationshof, decision of March 28, 1946, in re B.v.V.b.G., Zeitschrift des Bernischen Juristenvereins, vol. 82 (1946) p. 387; Schwyz, Justizkom., Oct. 16, 1950, SJZ 48 (1952) p. 309.

[13] 22 cantons, three of which are divided into half-cantons

[14] *Bundesgericht, Tribunal Fédéral* (Fed. Constitution Art. 106), aside from a few federal courts of special jurisdiction, such as the federal military courts and the Federal Insurance Court in Lucerne; see Ruck, Schweizerisches Staatsrecht, 2d ed. Zurich 1939, p. 104; Max Guldener, Das Schweizerische Zivilprozessrecht, Zurich 1947, pp. 14 et seq.

[15] Art. 110 *et seq.*

[16] Bundesgesetz über die Organisation der Bundesrechtspflege vom 16. Dezember 1943, Art. 41 ff.

[17] Bundesgesetz über den Bundeszivilprozess vom 4. Dezember 1947, which superseded the old Federal Civil Procedure Code of Nov. 22, 1850.

[18] Bundesgesetz über die Bundesstrafrechtspflege vom 15 Juni 1934.

relationship; or the group of persons having a right to refuse testimony because of privileged communication; or the extent of protection of business secrets, etc.[19] Most cantons still consider certain groups of persons as incapable to testify, for instance, a spouse or very close relatives, children under a certain age, persons who are mentally incapacitated, etc. In cantons which still take testimony under oath, certain groups may be witnesses but may not testify under oath, i.e., children under 18 or 16 (depending on the laws of the respective cantons), certain named relatives, persons interested in the outcome of the proceeding, persons with bad reputation, or who are mentally deficient. In a few cantons, there are groups of persons whose testimony may be rejected by the opposing party, such as close friends, employees, persons who would derive benefit or suffer disadvantage, close relatives, etc. Government officials and employees are another special group. They usually need consent of their superiors to enable them to testify or to produce documents.[20]

A similar situation applies with respect to production of documents. First, it should be clear that production of documents to the extent practiced in American federal courts pursuant to the rules on discovery proceedings is not known in Switzerland. The duty to produce under the various procedural codes is more comparable to a subpoena duces tecum under Federal Rule 45(b) than to production pursuant to Federal Rule 34. Thus, production may be demanded only for use as documentary evidence at the trial. The documents, production of which is sought, must be clearly designated and described. A request for "all the business correspondence relating to. . ." or "all the books" will not be permitted. Documents so produced become part of the court record and are necessarily limited in number.[21]

Distinguished therefrom is the right to inspect documents. This exists only when granted by substantive law, although in most instances it will be used to ascertain facts for the purpose of preparing a law suit. Such a right, for instance, is given in Article 330 of the Code of Obligations which entitles an employee to demand that his employer lay open his books for inspection by the employee or his trusted representative, if part of the employee's compensation consists of a share in the business profits; or the right of a spouse to inspect the business records of the other spouse in order to establish rights under the marital property laws,[22] etc.

Again the cantons vary in their provisions. Some cantons, like Bern, recognize a general duty of the parties to the action to produce all documents in their

[19] See Adolf F. Schnitzer, "Der Beweisantritt in den Prozessordnungen der Schweiz," ZSR 58 n.F. 318 (1939) 325 *et seq.*

[20] Bern (ZPO Art. 240) recognises a duty to produce documents concerning the government's ordinary business transactions, for instance the conclusion of contracts, but leaves the production of other documents to the discretion of the authorities.

[21] Luzern, Obergericht IK, Decision of Sept. 18, 1951, SJZ 48 (1952) 64; Zurich, Obergericht, Decision of Feb. 22, 1951, SJZ 47 (1951) 328; Sträuli und Hauser, Zürcher Zivilprozessordnung, Kommentar, Zurich 1939, § 228 N. 2.

[22] ZR 41 (1942) No. 87.

possession which may be required on or before the trial,[23] while third parties are treated like witnesses and may refuse production of documents in their possession on the same grounds on which they may refuse to testify.[24] Other cantons, like Zurich, recognize a general duty to testify, but not a general duty to produce books and documents. Section 228 of the Zurich Code of Civil Procedure imposes a duty to produce documents only when provided for by the substantive law. One such provision is Article 963 of the Code of Obligations which imposes a duty on business men bound by law to keep books to comply with a demand for production of books and business correspondence made in a dispute concerning the business enterprise, provided a relevant interest for such a demand is shown and the judge deems such production necessary for the presentation of evidence. This is a procedural provision included in the federal substantive law, meant to secure the enforcement of Article 957, Code of Obligations, requiring every person registered in the commercial register to keep books.[25]

The question whether the cantonal laws have been correctly applied, is a cantonal matter. Decisions of cantonal courts on cantonal laws cannot be reviewed by the Federal Tribunal, except when Article 4 of the Federal Constitution has been violated, namely in the case of an abuse of discretion or unequal treatment of a Swiss citizen before a cantonal tribunal.[26]

The question of "public policy" poses an additional problem. Some cantons consider the rules concerning the duty to testify and the exemptions therefrom as part of their "*ordre public*" (public policy).[27] This concept will, after all, be in every jurisdiction exactly what the courts say it is, and in the absence of a treaty there is no way for the Federal Tribunal to force its interpretation of *ordre public* on the cantons. But where a treaty is involved, recourse can be had to the Federal Tribunal, and the cantonal remedies need not be exhausted.[28] The Federal Tribunal is not bound by the interpretation of a treaty by a cantonal court, and it may reverse a decision merely for the reason that it disagrees with the cantonal court's interpretation.[29] Under this rule, the Federal Tribunal has forced a uniform interpretation of the concept of *ordre public* on the cantonal courts. For instance, Article 11 of the Hague Convention imposes a duty on the Parties to the Convention to comply with a request for judicial assistance addressed to them by a participant state. Such a request may, however, be refused if it tends to impair the sovereignty or endanger the security of the requested

[23] Bern ZPO 236.

[24] Bern ZPO 236.

[25] The federal legislature here was well aware of the fact that substantive law can be defeated by procedural law or the lack of it. See Alimenta v. Lechner, BGE 55 II 203 (1929); Epoux Posternak v. Bron, BGE 71 II 244 (1945); Obergericht des Kantons Solothurn, June 1, 1946, reported in SJZ 44 (1948) pp. 294/5.

[26] BGE 47 I 87 (1921).

[27] BGE 41 I 328 (1915); Zeitschr. d. Bern. Jur. Ver., vol. 82 (1946), p. 389.

[28] Deutsche Feuerversicherungs A.-G. v. Lucas, BGE 58 I 307 (1932).

[29] Decision of October 1, 1915, in re G., BGE 41 I 328.

government. Based on that provision, the Canton of Ticino refused to transmit the testimony of a witness to the Austrian court which had requested it, because under local law the witness, as spouse of the plaintiff, was incapacitated, whereas under Austrian law she was not. The Canton of Ticino claimed that the regulation prohibiting certain persons to testify was based on considerations of public policy. The Federal Tribunal held[29] that the request of the Austrian Tribunal must be complied with, because the Hague Convention has placed limits on the concept of public policy. The fact that the testimony of the spouse of the party is against the public policy of the Canton of Ticino in that it violates an express provision of its codes, is not sufficient to bring it within the exceptions of Article 11 of the Hague Convention, since it does not impair the sovereignty of the Canton nor endanger its security.

Since the cantons are free to legislate in the field of procedure, they may enact provisions allowing their courts to apply foreign procedural law in certain cases. The Code of Civil Procedure of the Canton of Bern has such a regulation. Article 17, paragraph 2 provides that "the judge, in rendering judicial aid, applies the local procedural law, unless the application of foreign procedural rules has been expressly permitted by the Appelationshof. The Appellationshof decides according to its discretion. However, compulsory measures for the enforcement of procedural acts which are unknown to the laws of Bern are not permitted."[30]

This provision shows a certain similarity with Article 14 of the Hague Convention which provides in paragraph I that the court, in complying with a request for judicial assistance, will apply its own procedural laws; but paragraph II requires that, if the requesting authority demands that a special form be observed, the requested authority must comply, provided such form is not contrary to the local laws. This provision has been invoked with respect to the taking of testimony under oath. A number of cantons in Switzerland have abolished the oath. In other countries, however, testimony not under oath will have no evidentiary value. A request for the taking of testimony under oath from a member state must, therefore, be complied with. However, a person refusing to take the oath cannot be forced to do so since compulsory measures to enforce the oath are unknown in the legislation of those cantons.[31] In the absence of a treaty, the cantons may refuse a request for testimony under oath without leaving the choice to the witness.

There is another important situation where a party to the Hague Convention must comply with a foreign court's request for judicial assistance, although, according to domestic law, the foreign court could not acquire jurisdiction of a certain action. Article 59 of the Federal Constitution guarantees the solvent debtor with domicile in Switzerland the venue of his domicile in *in personam* actions. Under this provision, for instance, Switzerland will have a right to

[30] Bern ZPO Art. 17, Abs. 2.

[31] G. Leuch, Die Zivilprozessordnung für den Kanton Bern (1937) p. 35; Schweizer Blätter für handelsrechtliche Entscheidungen, XVII p. 191 (1898); Bundesblatt 1898 II 763, 1908 VI 414.

refuse to take action pursuant to a letter rogatory from a foreign country which has taken jurisdiction in an attachment proceeding, if the nature of the cause of action is *in personam* under Swiss law, for instance, where the cause is based on a debt created by contract. Under the Hague Convention, a Swiss court may not refuse to act on a letter rogatory because of lack of jurisdiction under Article 59 of the Swiss Constitution, but this will not prejudice the right to refuse execution of a foreign judgment on the ground of the said Article 59, in the absence of specific treaty provisions.[32]

The foregoing discussion shows that under present conditions, namely, without a treaty regulating procedural problems, it may be somewhat frustrating for an American lawyer to secure evidence in Switzerland by way of letters rogatory. The major disadvantage lies in the lack of uniformity in the treatment of such letters rogatory, not only because of the difference of important procedural provisions, but also because of the different interpretations which the various cantonal courts may give to the same concept, for instance, to the important concept of *ordre public*. Since the Swiss Constitution preserves the right of the cantons to legislate in the field of procedure, interpretation of procedural rules by the high courts of the cantons are not reviewable by the Federal Tribunal. An international treaty agreement, being federal law, may impose on the cantonal courts the duty of applying foreign procedural law and will also assure uniformity of interpretation, since the Federal Tribunal can force its construction of the treaty provisions and also of the concept of public policy on the cantonal courts.

As has been mentioned before, when a witness complies with a duty to testify, he will be immune against criminal sanctions or damage claims for breach of any of the secrecy laws, and this applies, of course, also in cases where judicial assistance is rendered by the courts in Switzerland upon a request by a foreign court.[33] But the immunity does not extend to a witness who voluntarily makes statements to a foreign consulate or testifies or produces documents in a foreign court. However, it is quite possible that this is a problem which could be dealt with satisfactorily in a treaty.

HERMINE HERTA MEYER*

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[32] See G. Sauser-Hall, "Les commissions rogatoires dans les relations entre la Suisse et les États Étrangers," Journal du droit international privé, vol. 47 (1920) p. 64; Espanet v. Seve, BGE 25 I 93 (1899).

[33] ZR 31 (1932) No. 110. Kassationsgericht, July 2, 1931.

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THE NEW CONSTITUTION OF RUMANIA

The new Constitution of the People's Republic of Rumania of September, 1952, will in all probability become a landmark in the constitutional history

of the Soviet world. It is the first document to reconcile the conflict hitherto existing between the satellite constitutions and two Soviet official theories: the one, relating to the essence and character of the "New Democracies," emphasizes in its latest version the substantial identity of the political and economic structures of the two types of "Soviet" and "popular" democracies; the other, the Soviet theory on constitutional law, supports the thesis that there can be no divergence between constitution and society in a "socially advanced and progressive" state. Previous satellite constitutions, however, in contradiction to Soviet legal theory that the constitution is a mirror reflecting changing reality—the legal crystallization of existing arrangements—did not correspond to the fundamental changes occurring in the state.

The new Rumanian Constitution,[1] however, assumes to reflect the enormous transformations that have taken place in the political and socio-economic life of the country since March, 1948, when the first Constitution of the People's Republic of Rumania was adopted. In the interval, the means of production, transportation, and banking have been nationalized; the "socialist sector" of agriculture has been widened by the ever-growing influence of the state through the establishment of state farms ("sovchozi") and tractor stations; collectivization of land has been consistently pursued through a policy aiming at the elimination of the "kulak" elements and the support of the lower and middle strata of the peasantry; two monetary reforms have completely changed the financial status of the population—while the leu has been stabilized and pegged to the ruble, the people have been deprived of their savings; the structure and functions of the central and local governmental agencies and of the judiciary has gradually developed along Soviet lines; the opposition has been eliminated and the rank-and-file of the Communist Party purged of "unreliable" or "deviationist"elements.

The new Constitution, as a whole, very closely approximates to its Soviet prototype. While the Constitution of 1948—advanced as it was at the time from the Soviet legal point of view—preserved some outward manifestations of "bourgeois constitutionalism," particularly in its technique and its neo-latin legal style, the framers of the new Constitution carefully avoided

[1] The new Constitution of the People's Republic of Rumania was adopted by the Grand National Assembly on September 24, 1952. It differed little in substance from the original Draft submitted to the Assembly (March 27, 1952) by the Constitutional Commission headed by Gheorghe Gheorghiu-Dej, President of the Council of Ministers and Secretary-General of the United Workers' (Communist) Party. Out of the 18,836 "suggestions for amendments" offered by the population, only 34 were accepted. Of these 28 were primarily editorial, 2 changed the composition of the Council of Ministers, one stipulated the tax-levying authority of the Grand National Assembly, and one provided for the inclusion of the initials RPR (Rumanian People's Republic) in the country's emblem. Two amendments, however, were more significant. One eradicated the peasantry's personal property rights, granted in the Draft, to the land and farm implements which they brought into the collectives; the other, seeking to dissipate the democratic world's allegations that the country had obviously become a "Soviet province," purports to establish the principle of complete sovereignty by the inclusion of the provision that Rumania is a "unitary, sovereign, and independent" state.

these "antiquated" forms and sancrosanctly adopted the constitutional tenets of Stalinism.[2]

Compared to the earlier document the new Constitution contains certain features which seem to corroborate the complete Sovietization of the country. In fact, were it not for political expediency in the field of foreign affairs, the incorporation of the People's Republic of Rumania into the USSR as a constituent member would be only a matter of sheer formality, necessitating merely the amending of the USSR Constitution.

Short of this final step, however, the new Rumanian Constitution provides, in an almost unique manner in constitutional law, for the freezing of Rumania's foreign policy by incorporating in the text friendship and alliance with the USSR. Whereas the former Constitution completely failed to mention the USSR, the present document refers to the Soviet Union and the Red Army not less than five times. The USSR is depicted as the liberator of the country, whose friendship ensures "the independence, state sovereignty, development, and flourishing" of Rumania (Paragraphs 2 and 4 of the Introductory Chapter and Article 3).

The basic features of the new society are outlined in Chapter I. It defines the People's Republic of Rumania as a "state of the working people of town and countryside" (Article 1). The political foundation of the state is the "alliance of the working class with the working peasantry . . . in which the leading role is held by the working class" (Article 2). Thus, for the first time in a Rumanian constitution, the preponderance of the working class is formally acknowledged. Furthermore, the central strategic position of the Communist Party and its implicit identification with the state is, as in the USSR, legally declared (Article 86). In fact, notwithstanding the discrepancies existing between the constitutions of the people's republics, their main difference from the Stalin Constitution has thus far concerned the legal position of the Party. Whereas Article 126 of the USSR Constitution openly refers to the Party as the vanguard in "the struggle to strengthen and develop the socialist system," the satellite constitutions typically make no mention of its role. The Hungarian Constitution of 1949, which until lately was considered as the most advanced, faintly refers to it in Article 56. In reference to the right of organizing, this Article asserts that the state "in fulfilling its tasks . . . bases itself . . . on the working class, led by its *advanced guard* (emphasis supplied) and supported by the democratic unity of the whole people." Even the new Polish Constitution of 1952 fails to acknowledge the exclusive role of the Communist Party. Although the provisions of Article 72 have merely theoretical importance, as

[2] In fact, all component chapters of the Constitution proper—the Social Structure, the Supreme Organ of State Power, the Organs of State Administration, the Local Organs of State Power, the Courts and the Prosecutor's Office, the Fundamental Rights and Duties of Citizens, the Electoral System, the Arms, Flag and Capital of the Rumanian People's Republic and the Procedure for Amending the Constitution—have an equivalent in the Soviet Constitution. Indeed, some of the articles have been copied verbatim.

in practice no open opposition is permitted in Poland, they nevertheless "legalize" the existence of other political organizations.

The constitutional legalization of the Communist Party's exclusive control of state power in Rumania is based on the contention that with the complete eradication of the active opposition in the country the Party no longer needs to hide under the paraphernalia of tactical secrecy. The Party's "legal" control of the state apparatus is assured by its exclusive right to nominate candidates in the elections of deputies to the Grand National Assembly (Article 100). This control is further facilitated by the provisions of the new Electoral Law restricting the right of certain groups of people considered inimical to the regime to participate in the national elections. In this respect, the 1936 Constitution of the USSR (Article 135) is more liberal; it removed all discriminatory provisions—religious, economic, and political—formerly applied against non-Bolsheviks. This distinction is based on the supposition that, unlike the USSR, Rumania as well as the other popular republics, advanced as they are, are still in the presocialistic stage of development, which necessitates an incessant waging of the class-struggle against the "enemies of the working class."

Theoretically, the people exercise their power through duly elected organs, the Grand National Assembly and the People's Councils. These, in turn, appoint the necessary administrative and judiciary bodies, the Presidium, the Council of Ministers, the higher echelon of the judiciary, and the Executive Committees of the People's Councils respectively. Though the constitutional theory of exclusive legislative power in the Grand National Assembly is constantly maintained, Soviet and satellite legislative history reveals the preponderance of the Council of Ministers. While the Council is formally appointed by, and theoretically subordinate to, the Grand National Assembly, its members in reality are chosen by the Central Committee of the United Workers' (Communist) Party from among its leading functionaries. The primary function of the Council of Ministers is to effectuate the policies of the Party through the vast bureaucratic apparatus it controls; that of the Grand National Assembly is the ratification of governmental decrees.

Justice in the People's Republic of Rumania, according to the new Constitution, is administered by the Supreme Court, the Regional Courts, the People's Courts, and the Special Courts. Their main function is the defense of the political regime and the protection of communal property and of the rights of citizens (Article 65). Unless otherwise provided for by law, all judicial cases are tried with the participation of people's assessors (Article 66).

The supreme supervisory power over the observance of law by all central and local governmental organs of state power and administration as well as by all officials and citizens is vested in the Procurator General of the Rumanian People's Republic (Article 73). He is appointed by the Grand National Assembly for a term of five years, and he in turn, appoints his deputies and the procurators of the local units for a term of four years (Article 74). Whereas the organs of the Procurator's Office are independent of all local governmental

agencies, being subordinate only to the Procurator General, the latter is responsible to the Grand National Assembly, and in the interim between its sessions, to the Presidium (Article 75).

The powers and functions of the Procurator General are specified by Law No. 6 of June 2, 1952, concerning the "Setting up and Organization of the Procuratura of the Rumanian People's Republic." The Procurator General has the right to take part, "with a consultative vote," in the meetings of the Presidium and of the Council of Ministers (Article 4). He is empowered to see to it that the decisions and rules issued by the central and local agencies of state power and administration conform with the laws of the country. Charged with the administration of justice, he supervises the activities of the agencies of penal investigation; he may ask for the dossier at any stage of the investigation, and has the right to "issue compulsory instructions with regard to the development of penal investigation and inquiry and to be present at any act of penal investigation or to carry it out himself" (Article 7, Paragraph a).

The Supreme Court, whose chief function is the supervision of the judicial activities of all the courts (Article 72), is elected by the Grand National Assembly for a term of five years (Paragraph 1 of Article 67). The judges, theoretically independent and subject only to the law (Article 70), and the people's assessors are elected in accordance with the provisions of a special law (Paragraph 2 of Article 67). All judicial proceedings are conducted in the Rumanian language, with special provisions for the use of other languages in areas inhabited by compact groups of other nationalities or minorities. Persons not knowing the language in which the judicial proceedings are conducted are constitutionally guaranteed the right to acquaint themselves with the material of the case and the privilege to use their own language in the summation of their case (Article 68).

Unlike the Supreme Court of the United States, the Supreme Tribunal of the People's Republic of Rumania, like its Soviet counterpart, has no power of constitutional interpretation and is more of an auxiliary than an independent branch of government.

The constitutional provisions regarding the administration of justice, however "progressive" they may sound, conceal the true nature of the Marxist-Leninist concept of justice, which has been adopted by the People's Republic of Rumania as well as by the other countries in the Soviet orbit. The modern principles of penal law (*"nullum crimen sine lege; nulla poena sine lege"*) applied and observed in all civilized countries, have been replaced by the concept of "class-justice." Marxist doctrinaires assert that the purpose of "proletarian class justice" is the maintenance of the regime of the dictatorship of the working class and the complete elimination of all "reactionary" and "anti-democratic" elements.

Although the principle of "class-justice" has not been embodied in the two Rumanian constitutions framed under the regime of popular democracy, it nevertheless has found clear expression in Law No. 5 passed by the Grand

National Assembly on June 2, 1952, concerning the "Organization of the Judicature." Article 1 of the Law emphatically states that the function of the judiciary is the defense of the socio-economic structure of the state and of the rights and interests of state institutions and organizations. Furthermore, it is emphasized that the aim of the judiciary is the "education" of the citizens "in the spirit of devotion to the fatherland and in the spirit of the construction of socialism" (Article 2).

The people's assessors perform in practice a much greater function in judicial proceedings than those specified by the Constitution. The Minister of Justice is authorized to detail them from one court to the other whenever circumstances require. Thus, there are actually special teams of "people's judges" which the Ministry of Justice can use in accordance with the political interests of the Party.

Article 9 of Law No. 5 of 1952 also authorizes the courts to hear cases outside their seats if this is required "to fulfil the educational purpose of justice." Furthermore, hierarchically superior courts may take away from subordinate courts any case "in order to hear it themselves or have it heard by another court."

The required impartiality of judges is furthermore impaired by limitations imposed by the electoral laws on the right to participate in the election of people's judges. The privilege is restricted to the "democratic" elements only (Article 13, Paragraph 7, of Law No. 5). This is coupled with the provisions confining the nomination of candidates to the United Workers' (Communist) Party or to its affiliated mass organizations (Article 13, Paragraph 1).

In discussing the new role of justice and law, Vasilescu-Alba, a jurist of the Rumanian People's Republic, asserted that "all legal rules, being the expression of the will of the working class, must be understood and interpreted in the light of the class struggle." Justice is thus "an executive organ of the will of the working class." Positive law, when in disagreement with this principle, must make room for the "legal conscience of the proletariat."[3]

The fundamental rights and duties of citizens are enumerated in a special chapter. The primacy of social rights over individual rights is, as in the USSR, both functional and political.[4] Most of the rights and freedoms stipulated by the Constitution are either programmatic, circumscribed by escape clauses, or outright illusory. Thus, for instance, the provision relating to freedom of the press, speech, and assembly, as stated by Article 85, (a word-by-word replica of Article 125 of the Soviet Constitution of 1936), emphatically denies

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[3] "Statul Polițienesc" Cronica Românească, October 1, 1950, p. 25.

[4] Professor Boris Mirkine-Guetzevitch, while recognizing the dictatorial character of all the constitutions in the Soviet sphere, makes nevertheless a distinction between the declarations of rights of the Soviet constitutions and those of the satellite constitutions. According to Professor Mirkine, whereas the declarations of the People's Republics establish the "functional" primacy of social rights over individual rights, those of the Soviet republics establish "political" primacy. See Boris Mirkine-Guetzevitch, Les Constitutions Européennes, 2 vol. Paris, 1951.

the right and freedom of citizens to write, publish, or otherwise express their views, except such as are in accord with the given party-line. For the exercise of this right, the state places at the disposal of the "working classes and their organizations, printing presses, stocks of paper, public buildings, the streets (and) communication facilities." Freedom of speech is furthermore restricted by the provisions of the Law for the Defense of Peace, enacted on December 15, 1950. Article 2 of this Law specifically prohibits "propaganda inciting to war, the spreading of tendentious or invented news, of a nature to serve the warmongers, etc. . . ."

Freedom of the press and publication is likewise nonexistent. Two directorates attached to the Council of Ministers are charged with complete supervision over the press, publications of any sort, and their distribution. The Directorate of the Press and Printed Matter, established on May 23, 1949 (Decree No. 218) "authorizes the publication of all printed matter;" the General Directorate of Publishing, Graphic Arts Industry, Book and Press Distribution, established on March 16, 1950 (decree No. 62), "controls the output of publishing houses from the point of view of contents and form." The Communist press is furthermore restricted to the services of the AGERPRESS (the Rumanian Press Agency) which by virtue of Decree No. 217 of May 23, 1949, is the only agency permitted to receive and transmit news. Aside from the nationalization of all printing presses, a governmental decision (Decision No. 69 of the Ministry of the Interior, July 1, 1950) requires the registration with the militia of all hand printing presses, duplicating machines, and "materials needed for the reproduction of printed matter," owned by individuals or associations.

Freedom of assembly is similarly controlled. Excepting the Communist-controlled mass organizations, viz., public organizations, co-operative societies, youth and women's organizations, etc. (Article 86), no independent organization or association is permitted. Anyone attempting to organize or participate in such an organization is liable to prosecution by virtue of Article 86 of the Constitution, prohibiting the organization of or the participation in associations of a "fascist" or "anti-democratic" character. Such participation would furthermore entail "plotting against the internal and external security" of the state, an offense punishable by death under Article 1 of the Law for Punishing Certain Crimes Which Endanger the Security of the State of January 19, 1949.

The right to work is guaranteed by the "socialist transformation" of the economy and the "elimination of the possibility of economic crises and the abolition of unemployment" (Article 77). The right to rest and leisure is ensured by the reduction of the working hours to eight in factories and offices and to less in the more arduous trades.[5] This right is supplemented by

[5] The constitutional provisions relating to the reduction of working hours are puzzling in the light of the introduction of the piece-work system and norms of production (Labor Code of May 20, 1950) and the adoption of the Soviet model of "Stachanovism" and "voluntary labor."

the establishment of rest-homes, sanatoria, and cultural establishments (Article 78). The right to maintenance in old age and in case of sickness or disability is ensured by the development of social insurance and free medical service (Article 79). The right to education is ensured by universal, compulsory, and free elementary education and by the system of state scholarships awarded to deserving students (Article 80).[6] Equality of rights in all spheres of economic, political, and cultural activity is guaranteed to all citizens irrespective of their nationality, sex, or race. Any transgression of these provisions by the manifestation of race-hatred, chauvinism, or discrimination is punishable by law (Article 81).[7]

Some distinction was made at the beginning with regard to the German ethnic group, which had actively collaborated with Nazi Germany. The original decision to expel the Germans from the country, however, was officially changed in December, 1948, when the Rumanian Communist Party decided to replace the denunciation of the German minority as a whole and encourage instead the class struggle within its ranks. The resolution of the Party maintained that the "struggle against their own bourgeoisie . . . (would) open a new perspective to the German working population of Rumania, working alongside the Rumanian people and other nationalities."[8]

Whereas at the beginning Zionism enjoyed a tremendous popularity and even received latent, if not active, support from the Communist-dominated government during the Jewish-Anglo-Arab disturbances in Palestine, the above quoted resolution on the national question also declared:

> "Zionism of any color is a political nationalist and reactionary movement of the Jewish bourgeoisie, which tries to isolate the Jewish working people from the other peoples and to hinder them in their struggle against capitalism in the ranks of the anti-imperialist camp."

Notwithstanding the legal and constitutional provisions relating to the defense of the rights of nationalities and minorities,[9] the official policies of the Communist Party in regard to these questions have been based on the tenets of Leninism-Stalinism. While the development of national cultures and the use of national languages in all the fields of cultural and political endeavors are encouraged, the guiding principle is that of "socialism." "Na-

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[6] The system of education underwent drastic changes. See "The Perversion of Education in Rumania" published by the Rumanian National Committee, Washington, D.C., July, 1950.

[7] See Law No. 86 of February 7, 1945 (Statute for Nationalities) and Law No. 630 of August 6, 1945, in the Yearbook on Human Rights for 1946, United Nations, (1947) 248–49 and 249–51, respectively.

[8] La Roumanie Nouvelle, Bucharest, No. 14, December 30, 1948.

[9] As an apparent concession to the Hungarian minority in Rumania, the Constitution also provides for the establishment of a Magyar Autonomous Region (Articles 19–21) in the territory inhabited by compact Magyar and Székely population, including the districts of Ciuc, Gheorgheni, Odorhei, Reghin, Sangiorgiu de Padure, Sft. Gheorghe, Targu-Mures, Targu-Secuesc and Toplita.

tional culture" from the Leninist-Stalinist point of view is a culture *national only in form* and *socialist in content* and aims at the consolidation of the dictatorship of the proletariat.[10]

In fact, this principle has been legally formulated in Paragraph (j) of Article 17 of the new Rumanian Constitution according to which the state

> "ensures the development of the culture of the Rumanian people and of the culture of the national minorities, *socialist in content, national in form.*" (emphasis supplied)

Women are given equal rights with men in all spheres of cultural, economic, or political activities. The institution of marriage and the family is protected by the state, which grants aid to mothers of large families and unmarried mothers (Article 83). Freedom of conscience and religious worship is guaranteed. The school is separated from the church; except for the training of the personnel of the religious denominations, no congregation may open or maintain institutions of general study (Article 84). The constitutional provisions relating to freedom of conscience are rendered practically meaningless by virtue of Decree No. 177, Establishing General Regulations for Religious Cults, of August 3, 1948, and the Law on the Organization of the Ministry of Cults, of February 5, 1949. According to the Decree, all religious cults must be recognized by the Presidium, which must approve the statute of organization of the respective cult. The Ministry of Cults, the organ through which the Party exercises its control over religious denominations, is empowered to "supervise and control all religious cults and their institutions, and the special religious education for the training of all personnel of religious cults, the property and funds of any nature belonging to cults, as well as to confirm (or deny) the appointment of the entire permanent and temporary staff of religious cults, and to act as intermediary for relations and exchanges of information between cults in the country and abroad" (Article 1 of the Law for the Organization of the Ministry of Cults). The implementation of these provisions has resulted in the unequivocal subserviency of the cults to the regime.[11]

The inviolability of the home, the privacy of correspondence (Article 88) and of the citizen is guaranteed. No person may be placed under arrest without the decision of a court or "of the procurator" (Article 87). This assurance of the inviolability of the person is subject to the exclusive privilege of the Party or of its affiliated organizations to nominate candidates in the election of judges and the arresting power of the Prosecutor General, which is independent of the courts. Since there can be no writ of habeas corpus against the Procurator General—always a loyal servant of the Party—it evidently follows that extrajudicial arrest of any individual is within his discretion (see Article 8 of Law No. 6 of June 2, 1952).

Hand-in-hand with the rights enumerated above, the Constitution specifies

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[10] J. Stalin, Marxism and the National Question (1942) 207.

[11] For details see "Persecution of Religion in Rumania" published by the Rumanian National Committee, Washington, D. C., 1949.

the following duties of the citizens. It is the duty of every citizen to: abide by the constitution and the laws in force; safeguard and develop public socialist property; maintain labor discipline; actively contribute to the strengthening of the power of people's democracy; further the economic and cultural advancement of the country (Article 90); serve in the Armed Forces (Article 91); and defend the fatherland (Article 92).

The only international connotation in the Constitution is the provision of a "right of asylum" accorded to "foreign citizens persecuted for defending the interests of the working people" (Article 89).

Whatever the merits or shortcomings of this Constitution, it should be borne in mind that a "people's democracy," like the Soviet state, is not a legal state in the true sense of the word. Such constitutions are not truly fundamental laws, in the sense that they do not define or limit the powers of the state and protect rights of the citizens against arbitrary governmental actions. They are not based upon a compromise embodied in rules of law to which all citizens, irrespective of their ideological conceptions or political affiliations, are equally subject. In Marxian terminology, the Soviet state (like that of the People's Republics) is a "class-state," a class dictatorship. The misleading fallacy, however, lies—as the Soviet experience of the last 36 years and the satellite experiences of the last few years show—in the complete identification of the working class with the Communist Party and of the Party itself with its hierarchy.

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NEW LEGISLATION

FOREIGN INVESTMENTS IN FRANCE AND FRENCH EXCHANGE CONTROL—French exchange control regulations are not, in general, based upon nationality, except to the extent that French nationals are subject to special and stricter regulations regarding the purchase and sale of foreign assets. Insofar as aliens are concerned, depending on the case, either the residence of the interested party, or the currency used, determine the rules to be applied.

Purchase by a nonresident of any interest whatsoever in a commercial or industrial enterprise must be approved by the French Exchange Control authority (*Office des Changes*). Under preceding regulations, the same approval was required for acquisition of real estate and securities, but these transactions may now be carried out freely, subject to certain formalities.

The main feature of the French regulations is the control exercised by the *Office des Changes* over all financial transactions between residents and nonresidents; these must necessarily be carried out through authorized banks; the authorities thus strictly control all transactions and transfers of funds between

France and foreign countries; as a general rule, any transfer of funds from France to foreign countries can be effected only by permission of the *Office des Changes* and through authorized channels.

Foreigners, whether residents or not, are not allowed to transfer abroad the capital value of the assets that they possess, which are situated in France; only the revenue is transferable, in case the owner of these assets resides out of France.

However, under certain circumstances, the *Office des Changes* may authorize partial capital transfers, for instance in matters of successions, for personal assistance, marriage settlements, and so on.

On the other hand, the authorities permit the transfer of securities and credit balances of capital accounts (*comptes capital*) between nonresidents having capital accounts of the same nationality, the nationality of such accounts being determined, not by the nationality of the persons holding these accounts, but by the place of their residence.

The rule prohibiting capital transfers is very strictly applied: a foreigner, whether resident in France or not, who either acquires assets in France, sets up an enterprise, makes a loan to a resident, or even buys French securities, though he brought in fresh capital, would not be allowed to transfer it abroad, except by the indirect means explained above (transfer to a person holding an account of the same nationality) and generally subject to a loss.

At the time, this system protected France against loss of foreign capital, which could be particularly dangerous in the postwar period, but it prevented as well the bringing in of new capital.

In order to encourage the investment of foreign capital in France, new regulations were enacted in 1948 by *Avis de l'Office des Changes* 419 and *Instructions* 375 and 455. The great advantage of the new regulations is the possibility for foreign capitalists to transfer to a foreign country not only the income from these new investments made in France, but also the capital itself if they so wish.

These privileged investments can be made only in one of the three following currencies: United States dollar, Canadian dollar, and Swiss franc.

During the life of the investments, the investors can freely modify, within certain specified limits, and with the approval of the *Office des Changes*, the nature of their investments; they may also reduce or increase them, on the sole condition that these modifications be made through authorized banks, with a view to identify the funds invested, so that the investors will be in position to retransfer them if they so wish.

The practical importance of these measures, which in fact result in free transfer of foreign investments, is indeed considerable, though they appear to be little known outside of France.

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Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE

American Foreign Law Association

Arbulich v. Arbulich, 346 U. S. 897 (cert. den. Nov. 30, 1953) and 347 U. S. 908 (rehearing den. Febr. 1, 1954): no reciprocity rights of inheritance with Yugoslavia as of March 21, 1947, date of decedent's death (257 P. 2d 433).

Aurelio, Estate of Marino, 131 N.Y.L.J., April 7, 1954, 9 col. 2: Italian nationals as only distributees of decedent; objections of Deputy Consul General of Italy sustained.

Ballester, In re, 119 F. Supp. 629 (D. Puerto Rico, March 26, 1954): application for exemption from military service on basis of treaty between Spain and the United States of July 3, 1902, 33 Stat. 2108, bars Spanish citizen of Puerto Rican residence from American citizenship, notwithstanding his ineligibility for service in U. S. army because of membership in Spanish army reserve.

Bank of China v. Wells Fargo Bank & Union Trust Co., 209 F. 2d 467 (9th Cir. Dec. 21, 1953): liability for interest on bank deposit recovered by group representing Nationalist Government of China; "central bank" as fiscal agency of recognized foreign government.

Banque de Salonique v. Feldmann, 131 N.Y.L.J. March 5, 1954, 7 col. 8: application of laws of Turkey to performance of agreements in Istanbul.

Banta, Matter of, 204 Misc. 985 (Surr. Ct. Dec. 10, 1953): will not executed in conformity with law of Quebec (Quebec Civ. Code, §8425) since both witnesses did not sign in presence of testator and of each other.

Bishop's Estate, In re, 129 N.Y.S. 2d 387 (Surr. Ct. March 18, 1954): bequest to hospital in Scotland did not fail although hospitals were nationalized by British government; National Health Service (Scotland) Act 1947 (10 and 11 Geo. VI Ch. 27).

Bornstein, Estate of Vicky, 131 N.Y.L.J. April 13, 1954, 8 col. 2: heirship of paternal relatives of decedent under Netherlands law.

Bournias v. Atlantic Maritime Co., Limited, 117 F. Supp. 864 (S.D.N.Y. Jan. 15, 1954): one year statute of limitations under Panama Labor Code (art. 623) applied.

Brown v. Brown, 306 N.Y. 788, 118 N. E. 2d 603 (N.Y. Feb. 25, 1954): Mexican divorce invalid under law of Pennsylvania.

Brown v. Hugo Stinnes Corp., 306 N. Y. 789, 118 N.E. 2d 603 (N.Y. Feb. 25, 1954): action by holders of overdue notes issued by corporations owned mainly by (German) enemy aliens and supervised by Office of Alien Property.

Brownell v. Fidelity Union Trust Co., 119 F. Supp. 755 (D. New Jersey, March 25, 1954): German charitable organizations (Bodelschwingsche Anstalten) as beneficiaries of American trust; no application of doctrine of cy pres.

Brownell v. Kermath Manufacturing Company, 120 F. Supp. 331 (E. D. Mich., March 31, 1954): recovery of credit balance arising out of transaction violating Japanese foreign exchange regulations; insufficiency of proof of illegality under Japanese law.

Brownell v. Ketcham Wire & Mfg. Co., 211 F. 2d 121 (9th Cir. Feb. 19, 1954): legality of exclusive licensing agreement between American licensee and German patent holder; no violation of American anti-trust laws.

Brownell v. Singer, 347 U. S. 403 (April 5, 1954): liquidation of assets of New York agency of Japanese bank (Yokohama Specie Bank, Ltd.).

Calmar S. S. Corp. v. Scott, 209 F. 2d 852 (2d Cir. Jan. 25, 1954): doctrine of "constructive total loss" under a maritime insurance policy to be construed under English law; vessel under order of Australian government.

Central Hanover Bank & Trust Company v. de la Vega, 128 N.Y.S. 2d 297 (Sup. Ct. Feb. 25, 1954): transfer of trust fund to Mexican bank which was appointed by courts of Mexico as guardian for infant Mexican resident.

Chase Nat. Bank of the City of New York v. Directorate General of Postal Remittances & Savings Banks, 131 N.Y. L.J., April 27, 1954, 8 col. 2: payments to be made in Taipeh, Taiwan (Formosa).

Chipurnoi, Perry H., Inc. v. Tobu Boeki K.K., 131 N.Y.L.J., Jan. 26, 1954, 8 col. 2: testimony of Japanese experts in arbitration proceedings under Rules of Association of Food Distributors.

Chisholm, Matter of, 131 N.Y.L.J. April 13, 1954, 10 col. 3 (App. Div. 2d Dept.): beneficiary rights of residents of England under N. Y. trust.

City Bank Farmers Trust Co. v. National Cuba Hotel Corp., 131 N.Y.L.J., March 15, 1954, 9 col. 1; May 14, 1954, 1 col. 7 (App. Div. 1st Dept.): intervention of holders of preferred stock of Cuban corporation in action for declaratory judgment on trust indenture.

Clapp. v. United States, 117 F. Supp. 576 (Ct. Cl. Jan. 5, 1954): sale to a Finnish corporation of a vessel, *Empire Consequence*, previously sold by Maritime Administration to plaintiff's predecessor in title.

Cordero v. Brownell, 211 F. 2d 90 (2d Circ. March 24, 1954): status of ultimate (Bulgarian) legatees of inheritance vested under Trading with the Enemy Act though Bulgarian testator who died in New York was not an enemy within statutory definition.

Creswell v. Royal Ins. Co., Ltd., 131 N.Y.L.J., March 11, 1954, 7 col. 8: injunctive relief to restrain defendant from prosecuting action in Argentina on policies to be construed under Argentine law.

Cruzano v. People of Puerto Rico, 210 F. 2d 789 (1st Cir. March 11, 1954): application of Code of Criminal Procedure of Puerto Rico; Organic Act of Puerto Rico, 48 U.S.C.A. §737.

Czechowski, Matter of John, deceased, 131 N.Y.L.J., April 15, 1954, 11 col. 3: deposit of share of distributees residing in Poland pursuant to sec. 269 N.Y. Surrogate's Court Act.

De Sayve v. de la Valdene, 131 N.Y.L.J., May 5, 1954, 7 col. 7 (App. Div. 1st Dept.): French law as to 1928 Paris agreement for payment in foreign currencies; affirming 124 N.Y.S. 2d 143.

Dutch-American Mercantile Corp. v. Cotra Corp., 131 N.Y.L.J., April 2, 1954, 8 col. 3: purchase of English pounds sterling Belgian account for delivery to Netherlands Bank of South Africa at its London office; effect of payment "under reserve."

Eterpen Financiera Sociedad de Responsabilidad Limitada v. United States, 346 U.S. 817 (cert. den. Oct. 12, 1953; 124 Ct. Cl. 20): Argentine laws as to prosecution of claims of American citizens against Argentine government.

Falkefjell, A.S. v. Arnold Bernstein Shipping Co., 117 F. Supp. 22 (S.D.N.Y. Nov. 24, 1953): satisfaction of 1940 Swedish judgment by libellant; refusal of respondent to arbitrate after termination of occupation of Norway by the Germans in 1945; claim not arbitrable within charter party (78 F. Supp. 282, S.D. N.Y. 1948); no liabilty of agent under bill of lading.

Fink v. Bradford, 131 N.Y.L.J., April 23, 1954, 8 col. 7: tolling of Swiss statute of limitations.

E. M. Fleischmann Lumber Corp. v. Resources Corp. International, 211 F. 2d 204 (3d Cir. March 15, 1954): agreement to cut timber on tract in Mexico assigned to Mexican subsidiary corporation; effect of pending action in Mexican courts for declaratory judgment.

S. S. Fletero v. Arias, 22 U. S. LAW WEEK 2062 (4th Cir. July 31, 1953): injured Argentine seaman's failure to comply with Argentine law require-

ment to proceed under Argentine Workmen's Compensation Act does not bar suit in United States.

Gay v. Brownell, 120 F. Supp. 319 (D. Puerto Rico, March 31, 1954): expatriation of naturalized son of French parents through residence in France for more than 3 years.

Gensheimer v. Dulles, 117 F. Supp. 836 (D. New Jersey, Jan. 22, 1954): no expatriation by service in armed forces of Germany under German conscription laws.

Gerdau Co. v. Goyo Boeki Kaisha, Ltd., 131 N.Y.L.J., May 17, 1954, 9 col. 4: depositions to be taken in Japan.

Government of Indonesia v. The General San Martin, 114 F. Supp. 289 (S.D. N.Y. July 28, 1953): time limit for initiating arbitration against Argentine shipowner to be held in London; English court's denial of extension of time.

Goylie v. Stahr, 131 N.Y.L.J., April 13, 1954, 11 col. 6: custody of children to Chilean father married to citizen of Dominican Republic.

In re Grant-Suttie's Estate, 129 N.Y.S. 2d 572 (Surr. Ct. March 9, 1954): Canadian rule against perpetuities under a will of domiciliary of Province of Ontario, Canada; separate trust provisions as to American assets.

Gregg Company, Ltd. v. Koninklijke Nederlandsche Stoomboot-Maatschappij, 205 Misc. 378, 128 N.Y.S. 2d 65 (Mun. Ct. Dec. 23, 1953): action for damage to freight shipped from Belgian consignor to Peruvian consignee entertained since bill of lading indicates intent that rights be litigated in English-speaking country.

Guessefeldt v. Brownell, D. Col. Cir. No. 11927, May 13, 1954: finding affirmed of war-time residence in Germany of German national of Hawaiian residence and thus subject to vesting under Trading with the Enemy Act.

The Gylfe v. The Trujillo, 209 F. 2d 386 (2d Cir. Jan. 6, 1954): collision on high seas between Norwegian and Panamanian vessels; general maritime law governing rights and duties of parties is part of law of (American) forum; determination of dollar amount for expenditures when made in foreign currencies; inapplication of judgment-day rule.

Hawley v. Brownell, D. Col. Cir. No. 11802, April 29, 1954: recovery of vested assets of American estate denied to beneficiary, a native-born citizen of Germany and resident thereof, allegedly a victim of Nazi-oppression within the meaning of sec. 32(a)(2)(D) of the Trading with the Enemy Act.

Herrhammer v. Herrhammer, 129 N.Y.S. 2d 767 (Sup. Ct. Feb. 24, 1954): invalidity of Mexican divorce.

Hrabyk v. Everybody's Publishing Co., Inc., 131 N.Y.L.J. March 8, 1954, 7 col. 4: libel action of displaced person of Polish nationality, a Polish political writer, with respect to column "Wolne Glosy" (Free Voices).

Humenik-Ova, Matter of Zuzanna, dec'd, 131 N.Y.L.J., March 1, 1954, 14 col. 4: deposit of funds of Czechoslovakian distributees pursuant to sec. 269 N.Y. Surrogate's Court Act.

Hungarian People's Republic v. Cecil Associates, Inc., 118 F. Supp. 954 (S.D. N.Y. Dec. 29, 1953): action of foreign sovereign against landlord to recover deposits for lease of consular premises; frustration of contract because of closing consular offices on request of U.S. government; no plea of immunity for counterclaim by way of set-off; question of "friendliness" of foreign sovereign, with whom diplomatic relations are maintained, a subject for political, not judicial, determination.

Ivancevic v. Artukovic, 121 F. 2d 565 (9th Cir. Feb. 19, 1954): extradition treaty with Serbia of May 17, 1902, 32 Stat. 1890, effective treaty between United States and Federal Peoples' Republic of Yugoslavia, reversing 107 F. Supp. 11 (1952).

Kelvin Engineering Co., Inc. v. Royal Bank of Canada, 131 N.Y.L.J., March 23, 1954, 8 col. 1: action not entertained between two foreign corporations involving a tort (conversion of draft) committed in Cuba.

Keur v. Prominent Bulb Company, 283 App. Div. 543 (1st Dept., March 16,

1954): use of sole right of Dutch family trade name in the United States; evidence newly discovered at visit of plaintiff's lawyer to Holland does not warrant broadening of injunction restraining Dutch corporation.

Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. The Hakedal, 210 F. 754, 1954 A.M.C. 643 (2d Cir. March 3, 1954): recovery by German owner for loss of cargo on American ship, *Western Farmer*, which collided in English Channel with Norwegian ship, not estopped by English decree against American shipowner; statutory limitation of recovery in collisions on high seas are part of remedy to which law of forum applies.

Lambros Seaplane Base, Inc. v. The Batory, 117 F. Supp. 16 (S.D.N.Y. Dec. 7, 1953): delivery of salvaged seaplane to Receiver of Wrecks at Southampton, England, in accordance with English law.

Lange, Matter of, 283 App. Div. 223 (1st Dept. Jan. 19, 1954): disbarment of attorney advising illegally overstaying Cubans to make misrepresentations to Canadian border officials.

Langlas v. Iowa Life Insurance Co., 22 U. S. LAW WEEK 2489 (Iowa Sup. Ct. April 7, 1954): Korea conflict a war within the meaning of life insurance policy excluding from double indemnity death during military or naval service of insured in time of war. Cp. note on *Weissman v. Metropolitan Life Insurance Company*, 112 F. Supp. 420 (D. Cal. 1953), in 7 VANDERBILT L. REV. 295 (1954), and comment in 52 MICH. L. REV. 884 (1954).

Lepow v. Dimond Leather Co., Inc., 117 F. Supp. 480 (D. Mass. Dec. 30, 1953): letters of credit in British sterling for financing shipment of skins from India and Pakistan to Djibouti, French Somali Coast, East Africa; sterling owned by Italian resident not available under exchange control regulations in India and Pakistan; effect of 1949 devaluation of British pound.

Lundstrom v. De Santos, 127 N.Y.S. 2d 610 (City Ct. N.Y. Feb. 2, 1954): conversion of moneys payable on Irish sweepstakes ticket, which was collectible in Ireland. Cp. F. E. Dorwich, *The Irish Sweep and Irish Law*, this *Journal* vol. 2 (1953) p. 505.

Lutes v. Shenk, 131 N.Y.L.J., April 6, 1954, 7 col. 7: requirement of export license in India for spare automotive parts to be delivered to New York.

Maple Island Farm, Inc. v. Bitterling, 209 F. 2d 867 (8th Cir. Jan. 11, 1954): compensation for distribution of powdered milk in Mexico and Venezuela.

Molnar v. Molnar, 131 N.Y.L.J., April 28, 1954, 10 col. 4: invalidity of power of attorney for Mexican divorce.

Monaco v. Dulles, 210 F. 2d 760 (2d Cir. Feb. 15, 1954): no expatriation by serving in Italian army when Italian law requiring army recruits to take oaths may have been departed from in practice; no presumption of regularity of foreign-government practices. See also note on *Perri v. Dulles*, 206 F. 2d 586 (3rd Cir. 1953), in 102 U. OF PA. L. REV. 563 (1954).

In re Montale's Estate, 129 N.Y.S. 2d 746 (Surr. Ct. correcting 199 Misc. 711, 107 N.Y.S. 2d 146): agreement of American citizen residing in France for payment of checks after release of U. S. wartime restrictions on blocked funds; interest only from time that obligation to pay became absolute.

Nagano v. Brownell, 212 F. 2d 262 (7th Cir., April 22, 1954): no "residence within" Japan at the time of vesting of assets of Japanese wife of Chicago resident who never voluntarily relinquished residence in United States but stayed in Japan, "under unique Japanese custom," to arrange marriage for her daughters.

O. & Y. Nuri v. M/S Johanna, 1954 A.M.C. 440 (4th Cir. Jan. 27, 1954): jurisdiction in view of availability of witnesses of collision between Turkish and German vessels in North Sea.

Pastore, Estate of Anthony, 131 N.Y.L.J., March 3, 1954, 11 col. 1: application of Italian Civil Code as to legitimate children's rights in American assets,

as intestate heirs of Italian resident who died in Italy.

Patino v. Patino, 131 N.Y.L.J., May 6, 1954, 1 col. 1 (App. Div. 1st Dept. Apr. 13, 1954): agreement of Bolivian nationals that husband residing in France be immune from service of papers during ten-day visit in New York City for protection of family property interests against nationalization of tin mines in Bolivia.

Perkins v. De Witt, 131 N.Y.L.J., April 26, 1954, 9 col. 1: determination of Supreme Court in the Philippines binding as to title to stock.

Petscheff v. Cristo Petscheff, S. A., 129 N.Y.S. 2d 677 (Sup. Ct. March 2, 1954): commission for sale of Bulgarian rose oil; ownership of stock in Bulgarian corporations.

Porto Rico Lighterage Co. v. Marte Cia. Nav. S.A., 119 F. Supp. 366, 1954 Amer. Maritime Cases 377 (S.D. N.Y. Dec. 11, 1953): stay of suit for salvage services pending arbitration under agreement providing for Committee of Lloyds', London, England as arbitrators.

Protopsaltis v. Ocean Freighting and Brokerage Corp., 131 N.Y.L.J., March 1, 1954, 6 col. 7: application of Greek statutory law as to measurement of damages.

Rankin v. Atlantic Maritime Co., 117 F. Supp. 253 (S.D. N.Y. Dec. 8, 1953): action by administrator of Panamanian seaman's estate against owners of Panamanian ship to recover for injury; no requirement of application of American law in view of "overwhelming preponderance in favor of choosing Panama law."

Rosenberger, Estates of Rose and Ernst, 131 N.Y.L.J., April 19, 1954, 7 col. 6: transfer of funds from Holland to the United States; joint tenancy governed by New York law as intended by parties though disposition may have been void under Dutch or German law; recognition of death decrees of Dutch and German courts, of German refugees deceased in concentration camps.

Roth, Chester H., Co., Inc. v. British Overseas Air Ways Corp., 131 N.Y. L.J., April 28, 1954, 9 col. 2: issuance of a commission, and not of letters rogatory, to the United States Consul at Istanbul, Turkey, to take the deposition of a witness in "a friendly nation."

Rothschild, Estate of Jenny, 131 N.Y.L.J., April 21, 1954, 9 col. 5: deposit of shares of distributees residing in Czechoslovakia and Hungary, pursuant to sec. 269 N. Y. Surrogate's Court Act.

Rugani v. K. L. M. Royal Dutch Airlines, 131 N.Y.L.J., Jan. 21, 1954, 8 col. 8: timely presentation of claim under art. 20 of the Warsaw Convention of 1929.

Rumohr, In re von R.'s Will, 127 N.Y.S. 2d 327 (Surr. Ct. Jan. 22, 1954): interest acquired by German nationals after October 19, 1951, as beneficiaries of estate of American testatrix who died a resident of Germany in December 1945; no vesting because Germans are no longer enemy nationals since termination of hostilities with Germany (Public Law 181, Pres. Procl. No. 2950, 16 Fed. Reg. 10915).

Sakal v. Salti, 131 N.Y.L.J., May 19, 1954, 14 col. 2: attachment vacated regarding agreement with Swiss manufacturers for the purchase of watch movements.

Schmandt, Estate of Herman Max, 131 N.Y.L.J., March 5, 1954, 9 col. 5; March 25, 1954, 10 col. 4: execution of holographic will in Germany in accordance with German law (handwriting of decedent).

Schumacher v. Brownell, 210 F. 2d 14 (3rd Cir. Jan. 26, 1954): The Kyffhaeuser, League of German War Veterans in the U.S.A., as national of a designated enemy country by reason of its control through a German national association, subject to seizure of its American assets.

Selvaggio v. Selvaggio, 131 N.Y.L.J., March 11, 1954, 8 col. 1: valid submission of parties to jurisdiction of Mexican courts in divorce action.

Sik's Estate, In re, 129 N.Y.S. 2d 134

(Surr. Ct. March 8, 1954): residents of Yugoslavia at time Yugoslavia was invaded by Germany, agreed to repayment of loan in dollars from funds in New York and thus intended New York law to govern; transaction enforceable here, even if Yugoslavian exchange regulation forbade unlicensed contracts involving foreign currency. See also 131 N.Y.L.J., May 4, 1954, 7 col. 7: interest allowed from date of removal of federal restrictions on Yugoslav blocked assets (July 27, 1948).

Smith v. Furness, Withy & Co., Limited, 119 F. Supp. 369 (S.D. N.Y. Dec. 4, 1953): Jones Act not applicable to claim of British citizen resident of United States for injuries sustained on board vessel flying British flag and owned by British corporation.

Stemmler, Matter of John B., Surr. Ct. Chemung County, N. Y., Feb. 18, 1954: Catholic church legatees in U.S. as beneficiaries when by reason of war conditions payment of bequests to residents of Germany could not be made.

United States v. Ayers, 22 U. S. LAW WEEK 2526 (U. S. Ct. Mil. App. May 5, 1954): soldier's unauthorized absence during Korean conflict from unit stationed within continental U. S. an offense committed "in time of war" within meaning of art. 43(a) of Uniform Code of Military Justice.

United States ex rel. Matheos v. Garfinkel, 119 F. Supp. 810 (W.D. Pa. March 18, 1954): admissibility in deportation proceedings of reports by identified person representing consulate of foreign nation (Greece).

United States v. Taylor, 22 U. S. LAW WEEK 2526 (U.S. Ct. Mil. App. May 5, 1954): fraudulent enlistment in Army during Korean hostilities an offense committed "in time of war" within meaning of art. 43 (f) of Uniform Code of Military Justice.

United States Branch of Sumitomo Marine & Fire Ins. Co., Ltd. v. American Cargo War Risk Reinsurance Exchange, 131 N.Y.L.J., June 17, 1954, 6 col. 4: payment of interest allowed on reinsurance claims against Japanese corporation which was liquidated by Superintendent of Insurance of the State of New York.

Urda v. Pan-American World Airways, Inc., 211 F. 2d 713 (5th Cir. March 31, 1954): cause of action created by Brazilian law for death in crash of airplane en route from Buenos Aires, Argentina to Port of Spain, Trinidad, British West Indies, not enforceable in Florida as contrary to public policy expressed in Florida Workmen's Compensation Law.

Uthes v. Brownell, 118 F. Supp. 563 (D. New Jersey, Jan. 7, 1954): action for recovery of vested German assets equitable in nature and substantially similar to restitution remedy; hence plaintiff not entitled to trial by jury.

Valle v. Stockard Steamship Corp., 130 N.Y.S. 2d 550, 1954 American Maritime Cases 289 (Sup. Ct. Dec. 10, 1953): action for injuries sustained in Venice, Italy, against American employer though timely under Italian law barred by statute of limitations of Jones Act, 46 U.S.C.A. § 688.

Virtanen, Matter of Karl, dec'd, 131 N.Y.L.J. March 16, 1954, 13 col. 3: motion of Consulate General of Finland in the United States relating to examination of witness subscribing to will as delinquent in carrying out financial commitments.

Zieseniss v. Zieseniss, 129 N.Y.S. 2d 649 (Sup. Ct. March 17, 1954): divorce against husband resident in France for adultery committed in France; application of sec. 1147(2) C.P.A. in view of 1940 marriage in New York; constitutionality of provisions for service by publication or outside the state.

Book Reviews

GÉRARD, P.-D. *Les Auteurs de l'Oeuvre Cinématographique et Leurs Droits.* Paris: Librairie Générale de Droit et de Jurisprudence, 1953. Pp. 203.

VERMEIJDEN, J. *Auteursrecht en het Kinematographisch Werk.* Zwolle: W. E. J. Tjeenk Willink, 1953. Pp. 200.

SAVATIER, R. *Le Droit de l'Art et des Lettres* (*Les Travaux des Muses dans les Balances de la Justice.*) Paris: Librairie Générale de Droit et de Jurisprudence, 1953. Pp. 224.

MOUCHET, C.—RADAELLI, S. A. *El Autor de la Cinematográfica.* Madrid: Instituto Editorial Reus, 1953. (Pamphlet, pp. 26.)

There is no more controversial subject today than the question who should be considered the "author" of a motion picture and what the relationship should be between the many persons who make a contribution thereto, such as the *régisseur*, the writer of the story, the photographer, etc. These problems were recently treated in an elaborate opinion prepared for the Berne Bureau by Professor Eugen Ulmer, "*Kinematographie und Urheberrecht,*" which has been published in German, French, and English, the English translation having been separately prepared by the International Bureau at Berne and made available at the Bureau. Dr. Gérard covers the subject thoroughly with a very excellent legal discussion of all pertinent problems particularly from the point-of-view of French law. The work consists of three main parts. After an interesting historical introduction, the first part deals with the theories advanced by those who consider the producer of the motion picture as the overall author. Having demonstrated that the producer-author theory is not satisfactory, Dr. Gérard discusses in the second part of his book all those other contributors to motion pictures who are entitled to be considered co-authors of the ultimate product. He includes in this discussion the *régisseur*, the actors, the photographer, director, scenarist, and numerous others. The third and final part of the book discusses the respective rights of the various co-authors of a cinematographic work as between themselves, including an interesting discussion of the moral right doctrine as applied to the co-authors of a motion picture.

This book will undoubtedly serve as the basis for much further discussion in connection with the question what treatment motion pictures should receive, not only under the domestic copyright laws of each country but under the International Copyright Convention.

Dr. Vermeijden's work is further illustration of how much the question of motion picture copyright has remained in the center of discussion. His book is written in the Dutch language and discusses the same general questions which are reviewed in Dr. Gérard's book. It, too, represents a carefully annotated and scholarly contribution which, contrary to Dr. Gérard's work, relies to a very large extent not only on domestic sources but uses a comparative law approach and offers a detailed discussion of the pertinent provisions of the Berne Con-

vention as last revised at Brussels. It is particularly gratifying that the author has given us at the end of his excellent work a resumé in English, French, and German of the major conclusions at which he has arrived. Having pointed out that, under Dutch law, a cinematographic work is a collective work, the view also taken by Dr. Gérard in his book, he expresses the view that "because of the nature of cinematographic work as a visual, acoustic unit, the copyright should vest in the collaborating authors." Much study is given to the legal position of the so-called "adapter" and to the position of the producer of the film in his capacity as an employer. This work, too, devotes considerable space to a discussion of the problems of the moral right of authors.

Attention may be called to still another recent publication on the same subject of cinematographic works, the Spanish article by Carlos Mouchet and Sigfrido A. Radaelli, which was originally published in *La Revista General de Legislación y Jurisprudencia* in October, 1953, and has now been issued as a pamphlet.

Savatier, contrary to the above-discussed authorities, Gérard and Vermeijden, has written a delightful essay covering the basic problems of French copyright law from a legal point of view but illustrating them throughout by discussing famous and leading French copyright cases in such a way as to make interesting reading not only for the lawyer but for laymen interested in copyright as well. Professor Savatier's book must be considered "light" reading compared with the two previously reviewed books but at the same time it reflects great insight into the peculiar legal problems which surround works of art and products of the mind under French copyright doctrine. The Savatier book, contrary to the other two, does not even attempt to compare the French law with that prevailing in other countries but, on the other hand, covers a much larger area in trying to draw a picture of the legal position of authors of all types of intellectual and artistic works as recognized in French jurisprudence. A particularly interesting feature of the book is a thorough discussion of the relative rights not only of the author but of those members of his family who are entitled to share in his fortune and in his reputation. Problems of this type scarcely arise in the United States except in connection with the exercise of the renewal right, but in European countries, with their recognition of the moral right and *droit de suite*, many intricate legal questions constantly arise in this regard. Professor Savatier's book may serve to stimulate further interest and study in the United States of this and related problems.

WALTER J. DERENBERG*

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SERENI, A. P. *Aspetti del Processo Civile negli Stati Uniti*. Milano: A. Giuffre, 1954. Pp. 168 (Quaderni dell'Associazione fra gli Studiosi del Processo Civile, VI).

With a professional background in Italy and the United States and as a practitioner with one foot in New York and the other in his native land, no one

is better qualified than the author to present American law to Italian readers. This book is the latest addition to the long series in this process of mutual education to which he has been devoting himself. Without doubt it is the most difficult of the tasks he has undertaken; not only is our procedural terminology impossible to translate, but the whole theory and practice of our procedure differs radically from the European. The author has been compelled to leave much in English; occasionally, we fear, the explanations of these terms will leave the Italian reader unsatisfied.

The differences find their roots not so much in divergent legal concepts as in profound social and psychological contrasts. Among these he believes that the religious concepts of Puritanism versus Catholicism have played a major role. This may be open to doubt; the bases of our law were laid down in England before the Protestant Reformation, and the early chancellors were Catholic prelates. The book would be better if limitations of space had not compelled the author to scant the historical background. He devotes some place to old common law pleading, but none to the history of the jury or of the demurrer, without which it is difficult to understand our summary judgment procedure. And the influence on our presentday adversary system of our rural background with trials as sporting contests for a public hungry for amusement cannot be ignored.

The greatest interest of the book to an American lawyer lies in the comparison of the two systems and in the author's criticism of ours in the light of comparative law. With Italian lawyers as his audience, it is natural that no systematic exposition of the Italian law with which they are familiar is given, but the American lawyer is left, despite the broad generalizations of the contrasts, without too clear a notion of the Italian system. For instance, we would have liked more information as to the similarity between the motion for summary judgment and the "*procedimento ingiunzionale*" (p. 64).

Our trial system, Sereni finds, meets all the requirements laid down as the ideal by the great proceduralist, Chiovenda—concentration, orality, immediacy, and publicity—nevertheless, he expresses the view that it is unsuited for adaptation in Italy. This may well be true, but cannot some ideas taken from our practice bear fruit for the reform of part of Italian procedure? What can Italian law learn from us? This he leaves to the reader to find out for himself.

Apart from the differences springing from the jury system (wholly unknown to Italian law except in criminal prosecutions for high offenses, and there it is scarcely recognizable), the major differences are:

1. Our system of oral procedure is adversary, the initiative being wholly that of the parties and their lawyers with the judge's power limited, in contrast to the greater power of the Italian judge in an inquisitorial system. The lawyer here plays a more vital role than his colleague abroad. But do the judges over there in fact use the powers with which they are vested?
2. The overwhelming preponderance of oral testimony in our practice.
3. The difference in concept on what are matters of fact and matters of law.

Much that we treat as matter of law is deemed in Italy to be a pure question of fact.

4. The greater importance of pleadings in our law. "Pleadings" in our sense do not exist in Italian law. Apparently, Italy has abandoned the classical precept that judgment must be *secundum allegatum et probatum.*

5. Our much more profound examination of the facts in a case, arising in large part from our system of direct and cross examination.

Minor differences dwelt on include: our right of discovery and inspection is wider; our concept of privileged communications is narrower; the obligation to make out a *prima facie* case is very different; our notion of *res judicata* is less rigid, with our courts having a continuing power and the possibility of collateral attack; all judgments in Italian law must be motivated, whereas the jury gives no grounds for its verdict and an opinion by the judge is not obligatory. There is nothing in Italian law to correspond to our confession of judgment; its existence is due to the fact that a judgment is the only document that has executory force, whereas in Italy there are others; the confession of judgment, he points out, had its origin in the practice of medieval merchants.

The fundamental question is: does his book give the Italian reader a fair overall picture of our system? With minor reservations—it does. These reservations are principally three. By major concentration on practice in the federal courts and in the Supreme Court of New York, and omitting mention of our lower courts where procedure is rapid, inexpensive, and favorable to the poor litigant, the Italian reader may jump to the conclusion that *all* our procedure is unduly complicated, dilatory, and costly. This is accentuated by failing to weight the relative importance and frequency of the various possible pretrial motions that he enumerates. He sticks too closely to the written law as laid down in the books and fails to draw sufficiently on his experience. In most trials there is an informality that he fails to point out. Again he fails to notice the fact that the mere institution of a suit in the vast majority of cases brings results favorable to the speedy enforcement of rights and collection of claims, by settlement or default, without need to go to trial. This is not so abroad. I myself have come to the conclusion that with all its manifest defects, nevertheless our procedure, especially with the recent reforms, is superior by and large to that of the Latin countries.

The first and last chapters are thought-provoking generalizations, the long intermediate chapter is a detailed exposition of our practice and procedure from start to finish of a law suit, excluding appeals. It is complete and accurate, but on the dry side. Some picture of the drama of our trials would have been a relief. Bibliographical footnotes are ample. There is an appendix in English of illustrative forms in federal and New York procedure.

The chief defects of our system he finds are: the casuistry of our law of pleadings and the artificiality of the distinction between statements of law and conclusions of fact; the often unfair treatment of witnesses under cross-examination to test their credibility, shocking to European concepts of privity and

human dignity; the needless complexity of our rules of evidence; the undue burden cast upon lawyers, a contributing cause of the excessive cost of litigation. Many of his objections are echoes of domestic criticisms, but Italian law brings out their force. The best and most characteristic feature of our presentday system, he finds to be our pretrial procedure with its right to obtain evidence.

To sum up: Sereni has furnished a valuable contribution to comparative law.

PHANOR J. EDER*

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* Board of Editors.

CLEMENTS, A. V. *Comments, Cases and Text on Criminal Law and Procedure.* Buffalo, N.Y.: Dennis & Co., Inc., 1952. Pp. 941.

This is an original contribution. The author endeavors in effect to combine in a single volume the essentials of a manual, a casebook, and a theoretical and practical commentary on the various questions of penal law and criminal procedure. This important book, designed principally for the use of professors and students, is the product of instruction for a number of years, but it seeks also to provide practitioners with the information immediately necessary on particular points by furnishing references that will be useful for more complete study. From the comparative point of view, it will be remarked that this work accords a place, appreciably more important than Anglo-American treatises on criminal law generally do, to what Continental criminologists term general penal law, viz., the general principles concerning penal liability and accusation. It may also be observed that, despite evident differences in legal technique, the actual solutions as respects both general penal law and also special penal law (specific offences) are quite similar to those which have been adopted by the legal systems of Continental Europe or Latin America. The differences are more marked, however, as respects criminal procedures, and this work again exemplifies the primary importance ascribed, in America as in England, to the rules concerning administration of proof (evidence) in criminal procedure. Moreover, it is not without interest to note that the constitutional principles controlling criminal law, which are treated in the first part of the work, are much more concerned with procedure (or more especially the administration as such of criminal justice) than criminal law proper.

The two last chapters are devoted to the powers of the judge as respects pronouncing punishment, the indeterminate sentence, the effects of recidivism, conditional release, and suspension of sentence. The author proposes in effect to give a general picture of the application of criminal sanctions, and with regard to this the work furnishes information which ordinarily it would be necessary to investigate in very diversified sources. In the preface, the author states that he has resolutely excluded questions of essentially criminological nature. This can easily be understood, since in the form in which it is presented, his exposition of criminal law and of criminal procedure is already relatively quite substantial. And this can be understood the more readily since these topics today in America form the subject of a specialized literature, independent

of specifically legal studies. But it is equally appropriate to agree with the author's statement, in the same preface, that, contrary to what is too often affirmed, a really serious study of criminological questions can be undertaken only by those who already have knowledge of the general principles governing prosecution and condemnation of punishable acts. This rule of method, which is also a rule of good sense, deserves to be drawn to the attention of all those who are perhaps inclined to forget it. In the light of this statement, the exposition of positive law presented by Andrew V. Clements assumes its real value.

MARC ANCEL*

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PINTO, R. *Éléments de droit constitutionnel.* Second edition. Lille: Morel et Corduant, 1952. Pp. 579.

This treatise of Mr. Pinto, professor of public law at the Faculté de Droit of the University of Lille, appearing in this second edition after a four-year interval, is particularly instructive from several points of view.

First, the author appears, in the two successive editions, as the promoter of what is in France a new approach to legal phenomena. As he states in the introduction to the two editions of his treatise, he wishes "to make known more fully through the compartmentalization of specialized disciplines, the deep relationship of the various modes of knowledge, the unity of the science of Society. . . ." To this end, he "places before the student data scattered in the work of philosophers, sociologists and jurists," prefacing the description of the French constitutional framework, historical and current, with a "general introduction" dealing with "nature and society," "society and law," "the science of law and the science of politics," "fundamental legal notions" (such as the sources of law, the subject of law and legal capacity, the structure and the branches of law, the great legal systems), and, finally, the "notion of the State." This enables him to review succinctly, but with a clarity worthy of the best examples of French science, the notions fundamental to an understanding of the relationship between any "legal fact" and other "social facts" in general.

Thus the "*Éléments de droit constitutionnel*" of Mr. Pinto gives the uninformed reader much more than the title, however exact it may be, seems to promise. Indeed, while it is the elements of constitutional law, as of public law in general, that are here dealt with, they are conceived *lato sensu*, extending far beyond the stereotyped framework of French legal textbooks. The reader, however, remains unsatisfied, since the author's exposition is but a very general and extremely brief attempt (although the second edition has been enlarged) at such an explanation of social facts in their relationship to legal facts. This work has more the value of a pioneer example than of a truly deep study making any claim to completeness. Since the book is in principle intended for undergraduate law students, one may even wonder (as, indeed,

was the case already) whether the level of these introductory chapters is not too high, as the mental maturity of the average student for whom they are written, is not very great. Nevertheless, this attempt deserves attention far beyond the field of its practical use for students in French law schools, since it lends itself also to use by the jurist and the political scientist or the nonjurist in general, interested in the evolution and the current status of the French constitutional regime.

Second, the author makes a praiseworthy effort to expand his study in a comparative sense. A recognized specialist in American constitutional problems (Roger Pinto is the author of various studies in this field, the most recent being "*La Crise de l'État aux États-Unis*," published in Paris in 1951), the author illustrates his studies of French institutions with brief comparisons with British, Belgian, American, Swiss, and other institutions (for example: European constitutional regimes between the two wars, and the role of National-Socialism in this field). Moreover, he follows the general introduction with a chapter of about a hundred pages devoted to "Forms of the State" (this chapter was not included in the first edition). It contains expert analyses of American and Swiss federalism, of the formation of the state in Germany and Austria, of Soviet federalism, of the British Commonwealth and certain dominions (Canada, Australia, Union of South Africa), and, finally, of the regionalism, characteristic of the republican constitution of Italy of 1948. The chapter in question ends with a study of federalism in general (international and interstate), and of internal "decentralization" within the state (compared with the familiar criterion of administrative "deconcentration").

Third, Mr. Pinto has his own method of presenting phenomena of a constitutional nature, each of his expositions devoted to political institutions being preceded by chapters discussing the economic and social facts, as well as occasionally the technical circumstances and the political doctrines of the given period. Referring to economic conditions as a base for political events, the study of institutions is anchored in the terrain of society and the economic structure. "Without getting into historical materialism," says Prof. Marcel Waline in his analysis of the first edition of this treatise published in 1948, "one can in effect be convinced that constitutional events cannot be fully understood without at least an elementary familiarity with the economic and social situation of the age under consideration. For example, the bad harvests and especially the demographic shifts contribute to the explanation of 1789, just as economic prosperity explains the popular acceptance of the imperial dictatorship (in France) . . ."

In addition, it should be stressed that Mr. Pinto's manner of presentation is very happily combined with the publication of certain documents or extracts of historical documents, which serve to give life to the description of the facts analyzed and to illustrate the doctrinal conclusions. Thus, among many others, we find in chapters that deal with exclusively constitutional problems, the royal discourses of Louis XVI of Dec. 14, 1791, or of Charles X

of March 2, 1830; the royal *ordonnances* of May 15 and July 15, 1830, or the parliamentary discussions of March 1834 ("the birth of parliamentary interpellation") as well as, naturally, the present French constitution of October 27, 1946, *in extenso*. This fortunate combination, pedagogically well-supplied with commentaries and texts, is weighty but not heavy. It adopts the best traditions of French textbooks which, by entertaining the student, prevent him from being bored, without simplification or lowering for that purpose the level of teaching, the text being intentionally enlivened to make it less heavy and pedantic.

Mr. Pinto thus presents a manual of what would be called in the United States the "French system of government," expanded, to a certain degree, in the direction of "comparative government" (as, for example, the second edition of "Constitutional Government and Democracy" by Carl J. Friedrich) but—in conformity with French scientific tradition and pedagogy—excluding all the developments which in France form an integral part of the teaching program either of public financial law (*législation financière*) or of administrative law.

Having long taught in the French University of Indochina, the author does not fail to take into consideration in his sociological expositions, always alive and full of concrete examples, the wisdom of the legal philosophers of the Far East. On the whole: among recent works, textbooks, or treatises, dealing with this subject, those of Prélot, Vedel, Laferrière, Burdeau, Sibert, Duverger, Mr. Pinto's work is outstanding and—as Prof. Georges Berlia says in his analysis of the second edition (in *Revue de Droit Public*), ". . . besides being a pedagogical effort at clarification (constitutes) a true manual of comparative public and constitutional law, particularly when compared with the evolutions now taking place . . . and of great profit to many more than students of law . . ."

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GARAUD, M. *La Révolution et l'Égalité Civile. Histoire Générale du Droit Privé Français (de 1789 à 1804)*. Paris: Recueil Sirey, 1953. Pp. vii, 277.

Political ideals remain empty slogans without legal enactment. Laws remain dead letter without social enforcement. The task of legal history therefore is to reveal the impact of values on norms or, as it were, the interaction between the ideals of society and the facts of an actual social order. Professor Garaud's present volume carries this method to perfection. Based on the "rigorously legal" analysis of French revolutionary legislation during the years 1789 to 1804, it reveals the ideological undercurrents of eighteenth century political thought as well as the paradoxes of their social realization: the destruction of legal privileges by the privileged; the declaration of the rights of man combined with deprivation of rights and liberty; the abolition of an old feudal regime of monarchic tyranny by a new regime of popular tyranny; the imposition of mass

proscriptions and the guillotine on individual *lettres de cachet*; and, finally, one-man dictatorship that created the *Conseil d'État* and enacted a civil code, blending enlightened progressivism with conservative tradition and, being French, consummate in logic and form. Legal analysis, in addition, inevitably invites legal comparison. Suffice it to point out such outstanding legal features of the Revolution as the collective responsibility of members of a class, profession, or race, proved or denounced through administrative investigation of family documents; the substitution of lay tribunals for judicial courts; and the emergence of a new social elite and a new bureaucratic state machinery.

The present volume is the first in a series that proposes to deal with the development of private law in French revolutionary legislation. Its immediate topic is equality before the law. Further studies will follow, let us hope fairly soon, on the development of Property, Family, Succession and Donations, and Obligations.

The three parts of the book treat the abolition of social distinctions and the various legal incapacities, and the new social inequalities created by the Revolution. The concluding chapter deals with civil equality after the Revolution.

The first part contains the analysis of the legal structure of the old feudal regime and the changes brought about by the Revolution. The three separate estates (*ordres*), the origins of which reach back into age-old custom, were rather imposed on than created by the king, and formed the "nation within the nation." Separate chapters treat the clergy, the nobility, and the third estate, "the immense majority of the nation," in addition to the treatment given to the two lowest grades of feudal hierarchy, the serfs and slaves. The annulment of serfdom by the Constituent Assembly was merely the legal recognition of an actual fact and involved mainly the abolition of mortmain, whereas the theoretical abolition of slavery was practically disregarded in the colonies, where not even Colbert's *Code Noir* was carried into effect, and as any radical upheaval there would have affected the entire national income, considerations of liberty and equality were silently passed over. In fact, the final abolition of slavery was not carried through until the 1815 Treaties of Paris.

The author stresses as of special importance the internal hierarchy of the three estates, of a far more rigid structure than the dividing line between the lowest and the highest strata of the different estates. This was especially the case in the third estate, the members of which occupied as early as the sixteenth century important positions in the nation's judiciary and finance, and which exhibited the greatest variations in social positions and wealth, ranging from the "*pour l'honneur de la science*" top level of professors, magistrates, and lawyers through the lower degrees of merchants and artisans to those who "earn their living by the sweat of their brow." The glory that was the Revolution, and especially its consolidation, is due to this estate. Convoked to the *États Généraux* as the "*menu peuple*," a sort of motley crowd, the sole function of which was to vote subsidies to the king, it emerged from the Revolution not as the *ruling*

class but as the *only* class of the nation, comprising every man of France born free and equal. It was this class, moreover, that anticipated in its social habits and political viewpoints the bourgeois liberal prevalence in society that did not take place on the Continent until after the revolutions of 1848, and in Great Britain after the industrial revolution.

On the other hand, the detrimental consequences of this liberal *laissez faire* attitude are obvious from the chapters which describe the changes brought about in the situation of the working classes and the status of corporations and associations. The aim to acquire and the jealous protection of already acquired riches, expressed in the excessive concern for liberty of contracting and unlimited power over individual property, made the leaders of the Revolution as well as the new possessing classes absolutely blind to the requirements of the industrial and agricultural proletariat, on the one hand, and to the social usefulness of representing collective interests through corporations or associations, on the other. The Constituent Assembly, in the shadows of the *Contrat social*, adopted without debate the law Le Chapelier that declared the unconstitutionality of every assembly, deliberation, or petition of people on "their pretended common interests," and abolished every corporation and association as unnecessary intermediaries between the sovereign State and its people and as inimical to the liberty and rights of men. This led to the disappearance of the various municipal communities, religious congregations, ecclesiastical communities, universities, academies, and literary societies (although the meetings of the last three were not enjoined). Reforms affecting the judicial organization abolished the *Parlements* as well as the sovereign courts together with the professional communities of lawyers, notary publics, and clerks. Exceptions were made in the cases of charitable institutions and foundations, for fear that the already heavily charged state funds would prove insufficient to take over the charitable duties of these organizations, declared to be of "*utilité publique*." Although their properties became part of the national property, income and administration was left to their discretion. Still within the confines of individual liberty, no provisions were made to regulate labor contracts, and the individual worker was left free to negotiate his interests, however chimerical, directly with his employer. This was also the dominant attitude of the Code Napoléon, the "code of a bourgeois society," which contains as a unique measure for the protection of labor Article 1780, prohibiting any hiring of labor other than for a determined period, and it survives in existing French hostility towards associations and foundations other than "for purposes of public benefit." Agrarian legislation manifested the same neglect for sans-culotte interests, and has failed thereby to transform a political revolution into a social revolution. The newly created class of landowners received lands of a size that made independent living and farming impossible and, in this instance again a remarkable similarity to later events, increased merely the number of the already existing agrarian proletariat.

The second part of the book deals with the abolition of legal incapacities

resulting from religion, sex, and nationality. In this context a thorough analysis is given of the legal status of Protestants, Jews, Women, and Foreigners in the old regime and after the Revolution. Inequalities of this kind could not be maintained in the face of the Declaration of the Rights of Man, and, accordingly, Protestants and Jews were granted full citizenship. The liberal attitude towards foreigners, however, received definite setbacks after the Revolution, as the drafters of the civil code vacillated between the adoption of legislative or diplomatic reciprocity. Finally, the latter system was adopted in Article 11 of the Code Civil of 1804 that granted to foreigners the same civil rights as those granted to French nationals by treaties between the two countries. The legal capacity of women was enlarged in civil matters: they were granted equal rights of inheritance; capacity to contract in favor of third parties, to act as witnesses in civil actions, and they were admitted to the division of community property, to the guardianship of their children, and to the bar.

The third part of the book deals with the neuralgic spot of the Revolution, the treatment given to "emigrants" and "suspects" in the shadows of Liberty, Equality, and Fraternity, and the creation of a new class of indiscriminately privileged. "Wealthy" and "poor" were the collective catchwords that served for illegal discrimination or illegal recognition. It is unnecessary, however, to dwell on this topic any longer as the story of the *Terror* is too well known. Revolutions always devour their children—unfortunately not fast enough!

The concluding chapter deals with civil equality after the Revolution and reviews the legislative measures designed to uphold the ideas that remain the "unshakable legal foundation of the status of men since 1789, and the point of departure of every progress realized by social solidarity to our days."

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State Insolvency and Foreign Bondholders. Volume I. General Principles, by Edwin Borchard; Volume II. Selected Case Histories of Governmental Foreign Bond Defaults and Their Readjustment, by William H. Wynne. Yale Law School Studies, I, II. New Haven: Yale University Press, 1951. Pp. xxx, 381; xxv, 652.

The Borchard-Wynne set is a superb contribution to legal literature on foreign investments, also reflecting, incidentally, a venerable and too often neglected mode of scholarly analysis based on case histories. Upon Mr. Wynne's investigations of "the accumulation of foreign bonded debt, the causes and nature of ensuing defaults, the negotiations for a settlement, and the terms and effectiveness of debt reorganizations,"[1] with respect to the foreign state debts of Mexico, Peru, Santo Domingo, Greece, Portugal, Turkey, Bulgaria, and Egypt, the late Professor Borchard constructed Volume I. Unpublished studies on Serbia, Venezuela, Nicaragua, Salvador, Honduras, Haiti, Tunis,

[1] II, Preface vii.

and Morocco, and a wealth of other primary and secondary materials, have also quite apparently been utilized in the discussion of "General Principles."

It appears long to have been a matter of professional *esprit* among international lawyers to exclude all but public international law from their ken—based, of course, on the premise that the law of nations concerned in the strictest sense solely nations. It followed that the nature of international loan contracts concluded with states, and in particular the question of their regulation by international law, became a burning philosophical question. No doubt the limited scope of this study on state debts resulted from some such reasoning as well as the particular interests of Professor Borchard.[2] It is concluded here that the legal nature of the international state-loan contract

> "... is in fact a unique relation, depending in its various aspects on the laws of several countries—the country of the borrower, of issue, of payment—and, when diplomatic protection is invoked and extended, on certain rules of international law."[3]

It is respectfully submitted that private international loan contracts differ generically in no respects from these state-loan contracts. Indeed, the increased scope of state ventures, coupled with the prevalence of debtor state and now the popular capital exporter state[4] guaranty devices, tend further to obliterate any historic division of the field. Although perhaps unfair to criticize the Borchard-Wynne set for its restricted scope, it is nonetheless to be hoped that someone will take courage from their admirable undertaking and set out to complete the task.

Following a discussion of the nature and mechanics of the state loan, Professor Borchard deals successively with: Types of Loans, The Default on Government Loans, Bondholders' Remedies, Financial Control, and Readjustment of Governmental Defaults. Volume I appears not as up-to-date as Mr. Wynne's studies—this is apparent particularly in a section such as that on Bondholders' Legal Remedies. Certain Trading with the Enemy Act

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[2] See, e.g., Harvard Research, The Law of Responsibility of States for Damages Done in Their Territory to the Person or "Property of Foreigners" (E. Borchard, Reporter), 23 Am. J. Int'l L. Spec. No., Pt. II (1929), Article 8 of the Draft Convention dealing solely with claims arising from *state* contracts.

Mr. Wynne states that Volume I was planned to approach the subject "as far as possible from the viewpoint of international law," and consequently while the case histories of Volume II do not include "systematic description of the debtor country's economy" or "extended analysis . . . of its fiscal or balance of payments position," they do include much detail on the terms of loan contracts, the operation of bondholders' protective committees, the extent to which diplomatic support has been accorded to bond and tort claimants, debt readjustment procedures, preferential claims and treatment of different classes of creditors, and the establishment and activities of instruments of foreign financial control. II, Preface vii.

[3] I, at p. 15.

[4] See, e.g., MSA, Investment Guaranty Manual. June, 1952. The remedial difficulties faced by portfolio investors are, of course, in many respects more acute than those faced by direct or equity investors. See, e.g., recent U. S. commercial treaties with respect to property protection and disputes settlement, such as Treaty of Friendship, Commerce, and Economic Development with the Oriental Republic of Uruguay, Sen. Exec. D, 81st Cong. 2d Sess. (Articles VIII and XXI).

problems might well have been posed here, for example, the probable loss of funds to the Office of Alien Property through the inclusion in indentures of reversion clauses covering such unclaimed funds on deposit in the United States with trustees and fiscal agents (as well as depression experiences with eliminating such clauses by cabled renunciations to the trustees and fiscal agents to free such funds from the wave of other than bondholder-creditor attachments which followed debtor defaults in the early 30's). It is to be hoped that any sequel to this set will also include more materials on peace and treaty settlements and, in particular, the fabulous story of the post-World War II debt settlements. Although there are not many express suggestions to the draftsman in the Borchard-Wynne set, it should nonetheless assist practitioners to whose attention it is brought. For it is this writer's impression that much drafting work in this field is done by the corporate securities brethren who, though perhaps good corporate draftsmen, nonetheless too often enjoy an appalling lack of perspicacity in such fields as private and public[5] international law and the peculiar problems of foreign investment.

Borchard and Wynne did not attempt to appraise the place of state borrowing in the foreign investment field, nor the relative merits and demerits of such lending as an investment (although it is suggested that "defaults were by no means endemic to foreign bond issues"[6]), nor, most important of all, did they attempt to explore the probable impact on their field of "the current stagnation"[7] of private international capital. Professor Borchard sought merely to examine "how far past experience in the regulation of state insolvencies appears to have resulted in the establishment of principles and rules governing the matter."[8] It was modestly hoped that, irrespective of reduced defaults and the fact that it was then thought that "most countries will, for some time to come, have to look to the International Bank for Reconstruction and Development[9] and to United States Government agencies, rather than to private

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[5] A *private* underwriting agreement, dated 29 September 1925, between Rhein-Main-Donau A. G. and Messrs. Lee, Higginson & Co. and J. Henry Schroder Banking Corp., provided in paragraph 27 thereof for the settlement of questions or disputes under the agreement by arbitration, and further provided:

"Should one of the Parties not have appointed an Arbitrator or if the two Arbitrators fail to appoint such Umpire within 40 days after their appointment, then the matters in dispute shall be referred to and finally settled by the Hague Tribunal or the League of Nations or (if both these shall have ceased to exist) by arbitrators or an Umpire to be appointed by the President for the time being of the United States of America and the decision so arrived at shall be final and binding on all parties."

[6] I, Introduction xxv, with the additional truism, "Prudence in lending is, after all, the primary safeguard against default." *Id.* at xxx.

[7] Methods of Financing Economic Development of Under-Developed Countries. U. N. Pub. E/1333/Rev. 1 p. 23 (1949).

[8] I, Preface v.

[9] Even the lending policies of the Bank have been such that they have fostered a proposal for a fund which would finance basic non-self-liquidating facilities which bankers have never regarded as "economic." Report on a Special United Nations Fund for Economic Development. U. N. Pub. E/2381 (18 November 1953).

investors," "this record and analysis . . . will be found to have, in addition to intrinsic historical interest, some practical value."[10] If the era of great private lending is over this study may well have but limited usefulness. It is quite apparent, however, that federal governmental policy in the United States since 1953 has been directed toward the recapture of that imaginary lost yesterday of plenty through unfettered "private enterprise." In the event of the failure of this policy or should it be found one day that the profit motive, by definition and of necessity, does not unerringly direct itself toward socially desirable objectives and in particular toward the satisfaction of human needs and wants, a sequel to Borchard and Wynne on the legal problems of public (capital exporter) activities in the foreign investment field will be in order.

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[10] I, Preface vi.

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PATTERSON, EDWIN W. *Jurisprudence, Men and Ideas of the Law.* First Printed Edition. Brooklyn: The Foundation Press, Inc., 1953. Pp. xiii, 649.

After his searching studies on Cardozo (1939), Bentham (1945), Pound (1947), Dewey (1950), and Kelsen (1952), published in various law reviews, and another article indicating his interest in Logic in the Law (1942), the Cardozo Professor of Jurisprudence at Columbia University now offers, in the University Textbook Series, his Jurisprudence, which was thoroughly tried out as a student textbook in four previous mimeographed editions beginning in 1940.

The author expresses his indebtedness to Pound and Dewey. Indeed, one of the merits of the book is that it sums up a period when "the literature of jurisprudence" was "seething with ideas" (4). It does this in a lucid, balanced, informative, and suggestive way, with a sense for proportion, in a serene style well-suited for lucid expression and remarkably free from emotive language, his chief aim being "to interest rather than to indoctrinate" (VII). In short, the author, nourished by the main stream of philosophical and legal thought in this country, was in a strategic position enabling him to draw the balance between competing trends, to give all of them their due, and to present a picture which for a considerable period of time will serve, here and abroad, as the best available information about the present stage of jurisprudence as seen from America. Such a book, no doubt, was long overdue.

Another merit of the book consists in presenting the problems of jurisprudence in a calm, clear, and sharp light that makes his argument transparent and thus facilitates appraisal as well as criticism. Although called "an introductory treatise on jurisprudence" (VII) and not intended as a pioneering work, the book nevertheless contains a well-considered theory of the author's own and deserves, on this account, incisive appraisal and criticism.

Easily the chief service rendered by Patterson, informed by Dewey, is that

he establishes close, organic contact between philosophy and jurisprudence. Thus, he has clear views formulated about the status of universals and of the "Ought." Applying the instrumentalist interpretation of the former problem to law, he believes that legal rules *subsist* but do not *exist*, although they have indirect existential reference. But he also admits that legal relations are *created* and *existing*, since "such temporal factors as causation, foreseeability and expectation are highly important in many processes of legal evaluation" (40). Similarly, although paying tribute to Kant's separation of the *is* and the *ought*, even admitting that "an 'ought' proposition cannot be deductively derived from two 'is' propositions" (42), he nevertheless maintains that normative statements "come from somewhere," and that "legal meanings are derived from experience" and cannot be classified "with the axioms or theorems of logic or mathematics" (43).

All this, of course, immediately poses the problem of change, process, and causation. This, however, is obviously a stepchild. Since the author professes "axiological realism," in the sense "that legal evaluations should always be determined on the basis of facts" (VII), it is surprising that he did not reserve, in his basic organization of jurisprudence, a place for fact equal to that reserved for value. Legal change seems to be the common denominator of the ontological and deontological aspects of legal philosophy. To reduce jurisprudence, defined as "philosophy of law" (7), to logical and ethical theory, leaves out of account the philosophy of legal history culminating in a theory of legal change, although this alone adds bone and flesh to the skeleton of legal logic and axiology.

While this has been excluded, internal problems of "the law" have been included. This makes the organization of the book somewhat uneven, a circumstance aggravated by the fact that the axiological part is reduced to a review of doctrines without the benefit of the author's own independent theory. Another surprising omission is the lack of any theory of subjective legal relations, such as right and duty. This may be due in part to the difference between *law* and *ius*, the former not conveying both meanings of the latter. However, the very term jurisprudence is derived from *ius*, not *lex*.

Thus we are thrown back on the second part of the book (What is Law?) as both genuinely pertinent to legal philosophy and in the focus of the author's best endeavors. He distinguishes positive or imperative, institutional, and philosophical schools of jurisprudence (13–18); the third is obviously a misnomer in a jurisprudence defined as "philosophy;" it is, admittedly, "a classifier's limbo" (17). Nevertheless, the corresponding "three basic modes of characterizing law"—to which, however, a fourth (the social control conception of law) is added—are said to satisfy the requirements of real, as distinguished from nominal and conventional, definition (70). This parallelism between conceptions of law (ideal, institutional, imperative) and schools of jurisprudence (philosophical, institutional, positive-imperative) does not square, however, with the trichotomy of the "basic organization of juris-

prudence" (law, the law, value of law). More especially, the first and third members of the last trichotomy do square with those of the former ones, provided that the imperative conception is adopted. The incurable difference of the *second* member in each of the three trichotomies points to the cardinal asymmetry of the whole scheme. If the "institutional" school and conception are in any way "basic," the trichotomy of jurisprudence cannot dispense with them either. It cannot substitute, that is, "the law" for "legal change," internal for historical and sociological jurisprudence. Nor is the adoption of the imperative conception reason enough for such substitution.

Patterson adopts the "imperative conception." What are his answers to the usual objections? He admits its circularity, "for can one define 'sovereignty' or 'state' without reference to law?" (71). Next, he admits that the class of "complete" legal norms "may be a null class, one having no members" (135). Moreover, he disagrees, unnecessarily in my opinion, with Kelsen's statement "that the judicial decision itself is an individual legal norm." This last expression seems to him "a self-contradiction" (113). This reveals also a deep-seated divergence in views on "positivity;" to Patterson it means "law 'as is' (*positus*)"—correctly, I believe, it should be written either *positum* (*ius*) or *posita* (*lex*)—, whereas he well emphasizes that to institutionalists "the essential characteristic of law is that it shall *prevail*, that it shall actually represent the common interactions of men in their daily lives" (16). Indeed, this latter view is as old as Werböci's "*ius quo utimur*" (*Tripartitum*, 1517) and is, I believe, implicit in all legal cultures originating in customary law. The contrary view is formalistic and unable to distinguish dead-letter law, paper rules, from *ius vigens*. The trouble with desuetude, in the author's treatment, is the same as with custom (*consuetudo*); the trouble would disappear if he would distinguish the internal from the external problem. This is the precise point at which minds part and positivism becomes irrealistic, because formalistic. The author does not see that analytical method, positivism, and imperative theory *can* be separated, to the great advantage of the first, and even of the second. Instead, he burdens the third with the indissoluble union of law and state, renouncing thus the legal character of primitive law and international law.

However, the ultimate reasons of the author for adopting the imperative conception are respectable. He believes it is "most useful in distinguishing law from other things" (178). He even implicitly suggests a way out of the maze: "law is characterized not only by its relation to the . . . state, but also by its unique character as a legal meaning, that is, a statement meaning that from designated operative facts a certain kind of official conduct shall or should follow" (178). This latter approach could, indeed, *separate* analysis from its unholy union with the imperative conception along the line of the theory of legal relations or, as I prefer to say, the most developed social procedure. It is one of the outstanding merits of the author to revive interest in this line of thought as represented by the Hohfeld-Kocourek-Corbin school. This is also

the answer to the respectable objection that critics of the imperative conception usually take refuge in authoritative dogma or ineffable hunches (179). Yet Patterson is right in demanding, in effect, that in proposing another conception to replace the imperative one, it is not enough to discard the manifest errors in the latter; it is necessary also to account, in a more satisfactory way, for whatever apparent truth or usefulness is found in the former. His final argument, I confess, baffles me. He says: "the principal values of the imperative theory are peace, orderliness and freedom from official tyranny" (179). And I have believed its principal weakness is that it cannot distinguish law from tyranny.

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Supreme Court and Supreme Law. Edited by EDMOND CAHN. Bloomington: Indiana University Press, 1954. Pp. ix. 250.

The occasion in 1953, of the 150th Anniversary of the Supreme Court decision in *Marbury* v. *Madison*, was celebrated by a series of discussions upon Judicial Review held at the New York University School of Law; Professor Edmond Cahn, who presided at the meetings, has now collected the various papers presented into a single volume of essays.

The overall tone of the volume seems to be one of mild, if tempered, satisfaction with the Supreme Court's work and achievements during the one hundred and fifty years' of the history of judicial review in the United States. Thus, in treating of one of the most controversial phases of the Supreme Court's work during that period, namely its frustration of the intentions of the framers of the post-Civil War Amendments to the Constitution concerning race relations, Professor Paul Freund suggests that this simply reflected the changed temper of the time towards conciliation to the defeated Southern States; not judicial review, he contends, but legislative inaction has stood in the way of more thoroughgoing congressional enforcement of the civil rights guaranteed by the 13th, 14th, and 15th Amendments. And Professor Willard Hurst, after noting that in the 1930's the Court's veto on using national legislative power against the downswing of the business cycle lasted barely two terms, suggests that this points to the quite limited scope of the Court's practical influence in denying large and urgent demands of policy.

What all this seems to presuppose is a notion that the role of the Court in exercising judicial review is not to seek for any absolute meaning in the words of the constitutional text, or to cull diligently through the historical records in quest of the intent of the founding fathers. Professor Freund speaks with approval of the "calculated generality" of the various provisions of the United States Constitution, which he regards as facilitating "pragmatic as against nominalistic judgments," and he also criticises the tendency in times past to look for unworkable mechanical standards of constitutional interpretation,

especially in the area of the national commerce power. Mr. Charles P. Curtis goes further and points out that the "vagueness" in American constitutional formulae is less the product of the original draftsmanship of the founding fathers than the result of present judicial interpretation: phrases once lapidarian in the sense of being historically fixed and precise in meaning (for example Due Process of Law) in fact acquire a large generality only through the passage of time and succeeding judicial constructions. "What we have persuaded the Court to do is nothing less than [to] interpret for us and declare to us the immanent component in our constitutional law." And it seems clear that for Mr. Curtis the "immanent law"—the term is actually borrowed from Whitehead—is not the constitutional text of 1787 but rather a reflection of the consensus of opinion of presentday American society. We are back now, it seems, to the search for the *Volksgeist*. How is the Court to find the "immanent component" of American law? In the "captive audience" case,[1] the Court took note of public opinion surveys in reaching its finding that music-while-you-ride is not unconstitutional—a counting-the-heads type of approach. But the Court's task may be much more complex where (as for example in the race relations area) there are several competing "immanent laws" operating in different parts of the country. Professor Cahn points up the extreme difficulties inherent in any such concept as Mr. Curtis' "immanent law" by pertinently enquiring why it seems so generally to be assumed that the *Volksgeist* that the United States Supreme Court must consult is Anglo-Saxon. In spite of the predilections of Mr. Justice Frankfurter for the experience of the "English-speaking World" and of the United Kingdom in particular, it is a fact, as Professor Cahn points out, that the United States contains a "high proportion of individuals who do not share Anglo-Saxon origins." It is surely, at the very least, bad sociological jurisprudence, to assume without more that the experience of a politically, culturally, and racially homogeneous society like the United Kingdom is automatically relevant to the problems of a country so diverse in composition in these respects as the United States.

All this discussion seems to trend inevitably towards a conclusion that the United States Supreme Court is not a court of law stricto sensu, but something more—what we might call, for want of a better term, a "policy-making" body. And yet in exercising any policy-making functions the Court is saddled with the vestigial forms and techniques of the conventional court of law. Would recognition and acceptance of a policy-making role on the part of the Supreme Court at the present day require changes also in the procedural devices and machinery through which the judges operate in implementation of their policy choices, especially in what Professor Hurst calls the Court's "self-denying doctrines,"—the insistence on the existence of case-controversy as the basis for exertion of the Court's jurisdiction, the close scrutiny of the *locus standi* of those who would challenge the constitutionality of legislation, the refusal to enter the area of the

[1] Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

"political questions," even the presumption of constitutionality in so far as that concept "expresses the doctrine that debatable policy choice is entirely the business of Congress, and not at all the business of the bench"? (p. 148). This is perhaps the major area for disagreement among the members of Professor Cahn's panel. Professor Frank would go furthest of the panel in suggesting that the Court should effect widespread reforms in its procedural attitudes,—notably that it should contract the area of nonjusticiability (especially in regard to "political questions"), that it should ameliorate the requirement of standing to sue (especially in the First Amendment cases), and even abandon the presumption of constitutionality altogether in civil liberties cases. On the other hand, Professor Freund, who in this respect comes closest to the traditional approach, finds the strict insistence by the Court on the forms of the conventional lawsuit to be one of the best means of ensuring that the Court shall only pass on concrete problems and avoid giving abstract opinions without the benefit of a factual record.

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Book Notices

Revista Jurídica de la Universidad de Puerto Rico. (Comparative Law issue.) Vol. 22 (1952/3).

To commemorate the fiftieth anniversary of the establishment of the University of Puerto Rico, its Law School decided to turn the entire twenty-second volume of its law review into a symposium on comparative law. The stately volume of 475 pages, of which both an English and a Spanish version have been published, reflects the special position which the Commonwealth of Puerto Rico occupies as one of the regions in which Common Law and Civil Law have come to interpenetrate each other.

In his Introduction, Dean Manuel *Rodríguez Ramos* briefly surveys the development and special position of the University of Puerto Rico in general and its Law School in particular.

Problems of history of jurisprudential ideas are treated in Hans *Kelsen's* essay on "The idea of justice in the Holy Scriptures," and Mitchell *Franklin's* inquiry into "The Kantian foundations of the Historical School of Savigny." To his article on "The judicial process in the United States and Germany" contained in the recently published *Festschrift für Ernst Rabel*, Arthur *von Mehren* has provided a counterpart on "The judicial process in the United States and France." Max *Rheinstein* has contributed a short essay entitled "Common and Civil Law; an elementary comparison." Legislative technique is investigated by René *David* in his article on "The distinction between *lois impératives* and *lois supplétives*." Ernst *Rabel* has contributed as a "specimen of comparative law" a survey of "The main remedies for the seller's breach of warranty." In the course of his investigations on liability for tort, Ferdinand F. *Stone* has written on "Delictual liability for ruinous buildings to persons and property outside the premises." Eduardo J. *Couture* (Montevideo) has contributed a theoretical inquiry into "Meaning, style and scope of civil procedure." Luis *Jiménez de Asúa* (Madrid), writing on "Taking the law into one's own hands," criticizes the relevant provisions of the Puerto Rican Criminal Code. "The methods of legal development through judicial interpretation in Louisiana and Puerto Rico" are compared by Joseph *Dainow*. "The law of obligations in Puerto Rico during the first half of the 20th century" is analysed by Garoa *Velázquez*, and "Factors conditioning Puerto Rican labor policy" are investigated by Samuel *Helfeld*.

With its rich fare the anniversary volume constitutes an important contribution to comparative law. It should not be missing in any major law library, irrespective of whether or not it also has on its shelves the other volumes of the Revista Jurídica.

M.R.

Skadeståndsrättsliga Spörsmål (Problems in the Law of Torts). Stockholm: Försäkringsjuridiska Föreningens publication No. 10, 1953. Pp. 335.

GRÖNFORS, K. *Skadelidandes Medverkan* (Contributory Negligence). Stockholm: Försäkringsjuridiska Föreningens publication No. 11, 1954. Pp. 213.

These two volumes are devoted to an unbiased description and discussion of several problems of Swedish tort law by some of the best-known scholars in this field. The fact that this publication is due to the initiative of some of the largest Swedish insurance companies may of itself be sufficiently significant for American readers to warrant this brief review. The far-

flung comparative method employed in these studies, reaching far beyond other Scandinavian laws into those of England, France, Germany, and Switzerland, makes these studies particularly valuable to the comparatist.

In the first volume, Professor Lundstedt, the noted legal philosopher, offers a comparison between the English and Swedish law concerning the tort liability of hospitals to their patients, stressing the independence of Swedish (as well as German and Swiss) vicarious liability from fault on any level (pp. 119–148), while Professor Leyman analyzes the somewhat confused case law on independent contracts (pp. 89–118), and Professor Folke Schmidt deals with the employer's liability for accidents occurring in his enterprise (pp. 189–232). More general in character is Dr. Danielsson's study of the Danish rule authorizing the judge in the absence of specific proof to use his discretion in assessing damages, a rule which the author recommends for adoption (pp. 5–30).

Other topics range from the regulation of insurers' subrogation claims (Hellner, pp. 31–50),[1] and the liability for animals (Hörstadius, pp. 51–58), the liability of attorneys (Wiklund, pp. 293–334) and of landlords (Vahlén, pp. 233–292), to damages for loss of support (Norström, pp. 149–188).

Grönfors, who recently published an extensive treatise on transportation liability,[2] is the author of the second volume in the series, which, planned as a contribution to the first one, outgrew its original destination. The principal value of this work lies in the meticulous analysis of the statutory and decisional law of contributory negligence in cases of strict liability, culminating in a discussion of reform proposals recently submitted for Sweden, Denmark, and Norway,[3] which have considerable bearing on current discussions in this country.[4]

EGON DROSTBY

GLETTIG, E. C. *Das schweizerische Clearingstrafrecht.* Basel: Verlag für Recht un Gesellschaft AG., 1952. Pp. xviii, 191.

As the Swiss franc is freely convertible, the mere fact that there exist Swiss foreign exchange regulations may come as a surprise to some readers. The author therefore sets out to explain the economic necessities that forced Switzerland to react against the exchange control measures adopted by most other countries by concluding clearing agreements with such countries. Under these agreements, Swiss importers from such countries shall not pay their debts directly to their foreign creditors but to the Swiss Clearing Office. This applies likewise to other payments (e.g. for alimony) to the country concerned. Out of the amount of Swiss francs thus collected in the clearing, the Office will pay in Swiss francs Swiss exporters to the country concerned and other Swiss creditors. The foreign creditor of a Swiss receives payment in his local currency out of the payments, which his co-nationals, debtors of Swiss creditors, make to the clearing authorities of the foreign country concerned.

This clearing system has to be protected by making it a criminal offence for a person resident in Switzerland to pay his creditor in a country which has concluded a clearing agreement with Switzerland through any other channels than through the clearing. In the same manner, the foreign creditor accepting such extra-clearing

[1] Ehrenzweig, Book Rewiew, 2 A.J.C.L. 562 (1953) on Hellner, Försäkringsgivarens Regressrätt.

[2] Grönfors, Om Trafikskadeansvar (1952).

[3] Nordisk lovgivning om Erstatningsansvar. Betaenkning afgivet af H. Ussing samt indstilling fra delegerede fra Danmark, Norge og Sverige. Koebenhavn 1950.

[4] See in general Orfield, The Growth of Scandinavian Law (1953); Basye, Book Review, 41 Calif. L. Rev. (1953) 774.

payments is also liable to punishment. Moreover, it is necessary to prevent persons not authorized to claim payment out of the clearing fund, collected exclusively for the benefit of Swiss creditors.

The sanctions for the above-mentioned offences against the clearing form the subject matter of the present book. It is a typical result of the swift-changing character of foreign exchange control legislation, that in Switzerland as elsewhere, these rules are contained in a vast amount of decrees, ordinances, and semi-official service instructions. In view of the economic importance of foreign exchange control, such controls are exercised to a very large extent by autonomous bodies like the Clearing Office, being under the decisive influence of the National Bank. Although in Switzerland anti-clearing offences are punished exclusively by the courts, decisions whether sanctions shall be enforced in particular cases rests practically in the discretion of the Clearing Office, as the courts are more than hesitant to entertain such cases *ex officio*. In practice, the jurisdiction of the courts is even less exclusive than that. In many cases, the provisions enforced by the Clearing Office, under which a person having made extra-clearing payments is required to pay the same amount once more into the clearing, involve a greater financial loss than the fine imposed by the court, as, in most cases, the offender will be unable to recover the extra-clearing payment.

Swiss law provides a maximum fine of 10,000 Swiss francs or one year's imprisonment for such offences. The author rejects the practice prevailing in many other countries to establish the amount of the fine in mathematical relation to the sum involved in the offence, a system which seems only advisable in countries with unstable currencies. The obligation to pay once more into the clearing such amounts as were originally paid outside the clearing helps to establish a certain relation between the offence and the punishment. Moreover, within the above-mentioned limits, the courts are free to tailor the punishment to the importance of the crime. Compared with other laws, the Swiss anti-clearing law is lenient. However, the fact, that all fines are imposed by the courts, while giving the offender every guaranty against arbitrary administrative decisions, on the other hand, may cause undue hardship as any such fine imposed by the courts will be entered in the criminal record of the offender. This leads to the result, that the Clearing Office refrains from persecuting minor offenders and merely sends them a warning notice. Reasonable as this practice is, it is none the less illegal. The author, therefore, is in favor of some sort of administrative procedure to punish such minor offenders, which would leave their criminal records clear.

As the new Swiss Penal Code came into force only after most of the anti-clearing regulations, the author discusses at some length their interrelations. As the anti-clearing rules are more specific, they prevail over the more general norms of the Code. Thus a person, falsifying a clearing certificate (a special offence under anti-clearing rules) will be punished only according to this rule and not under the code provision punishing the falsification of official documents—although a clearing certificate is an official document. The fact, that a person did commit an offence under orders of a superior (e.g., a bank clerk under orders of his manager) does not exculpate the offender but constitutes a mitigating circumstance. One more provision is worth mentioning as being significant of the liberal spirit of the Swiss and of their respect for the role of banks in their national economy: investigations against anti-clearing offences shall respect banking secrets—a restriction which was unknown in the German pre-1945 foreign exchange control legislation.

The author has worked for several

years in the Swiss Clearing Office (*Schweizerische Verrechnungsstelle*), which is the authority entrusted with the task of enforcing Swiss foreign exchange regulations. His book therefore is the result of personal experience; it is extremely well documented, the author quoting inter alia many hitherto unpublished, but highly interesting cases.

I. SEIDL-HOHENVELDERN

LITVINE, M. *Précis Élémentaire de Droit Aérien.* Brussels: Établissements Emile Bruylant, 1953. Pp. 259.

Mr. Litvine, the secretary of the Conseil d'Administration of the Belgian national airline known as the SABENA, joins the growing list of aviation lawyers usefully engaged in presenting statements of the international and national law of aviation as seen from the standpoint of some one nation. Shawcross & Beaumont have depicted the English approach; Goedhuis and Kamminga have written for The Netherlands; Lemoine's great French work has been followed by two excellent shorter works by Juglart and by Chauveau. Meyer has given a German preview. Now we have the Belgian view. With each new volume, the skill, clarity, and accurate condensation has notably improved.

It may be difficult to improve on Mr. Litvine's work, which brings the Belgian account down to October, 1952. In 250 pages he encompasses the aspects dealt with by Lemoine in three times as many; but this is accomplished by copious and generous references to more extended discussions of points by other writers. So we have here, in pocket-size, a vade mecum to the international aspects and to their application in Belgium. It is a masterly compression.

Belgium, we learn, has accepted the Warsaw Convention as to air carriage of passengers and goods, not only internationally but as domestic law—in which it has been followed by Germany, The Netherlands, the four Scandinavian States, Switzerland, Italy, as well as by Brazil, and most recently by Britain. Also Belgium has enacted the Rome Convention of 1933 as to damage by aircraft on the surface, and it apparently cannot be said that the Belgian domestic application has proved the burden so ardently feared by many critics. Thus Belgium is an outstanding leader in equating its internal aviation law with the three great multilateral conventions of Warsaw, Rome, and Chicago. But it has not yet accepted the Geneva 1948 Convention on Rights in Aircraft and Mortgages.

As for the United States, Mr. Litvine remarks that our jurisprudence in accident matters is *très variable*; and indeed it is. The reader might be somewhat enlightened by saying that our tort cases are usually decided by juries; and that our tort law, and especially our wrongful death law is split up into forty-eight independent state sectors, as well as the District of Columbia, territorial and "possession" sectors, alongside which a Federal aspect is creeping back despite the doctrine of *Erie v. Tompkins*. But most incomprehensible to our foreign friends is our devoted attachment to the view of public policy which forbids a carrier and his passenger to agree in advance on any standards of liability, leaving it to the widows and widowers to discover, after the disastrous event, where perchance their legal rights may arise and what they may amount to. This is indeed the breeder of that mass of accident litigation which distinguishes the United States from all other nations in these days.

In so large a field, a few slips seem bound to occur. The bibliography overlooks Ambrosini's *Corso*, in Spanish, published in Buenos Aires; the joint work of Riese and Pittard on Swiss law; Rhyne's book on *Airports and the Law*; Wilberforce's penetrating article on the Geneva Rights in Aircraft Convention in the Journal of Comparative Law, Guldiman's work

in Zurich, and Kamminga's new book on the *Aircraft Commander*. Curiously it does not list the second (1950) edition of Shawcross & Beaumont, which is much better than the listed edition of 1945.

Also it seems that the *Air Law Review* of New York University, published from 1930 to 1943, was not available to the author; nor were the CAB Reports or the *Annual Survey of American Law*. European libraries are unhappily lacking in American materials for the 1930s and the war years—a lack which some of the great foundations might well help in correcting.

ARNOLD W. KNAUTH

KISS, A. C. *L'abus de Droit en Droit International*. Paris: Librairie Générale de Droit et de Jurisprudence, 1953. Pp. 197.

This reviewer particularly welcomes the convincing proofs presented by Kiss in favor of the existence of a rule of international law prohibiting abuse of rights (*abus de droit*), especially in view of the statement by such an eminent specialist of international law as Professor Goodhart in his recent work, *English Law and the Moral Law* (at pp. 146–147), that there is no room for such a rule in international law and that its adoption should be discouraged even *de lege ferenda*. Like Goodhart, the author is not blind to the fact that this rule introduces a further element of uncertainty into the rules of international law—which even without this notion are not too well-defined. Kiss, however, points out that, at least in some fields, the rules of international law are of such nature, that abuse of the corresponding rights is possible. By adducing numerous examples from all fields of international law gathered from the opinions of authors, decisions of international, arbitral, and national courts, and from diplomatic correspondence, chiefly of the United States, the author demonstrates that the necessity of avoiding abuses of rights has been clearly recognized and has led to decisions prohibiting abusive exercise of rights, especially when manifested in actions causing actual direct damages to other states or their nationals, whether by encroaching upon the sphere of competence of another state, or by asserting rights conferred for specific purposes as a means to attain other ends, or by arbitrary use of discretionary powers.

The work is extremely well documented. Examples from diplomatic practice are necessarily almost exclusively restricted to the practice of the United States State Department, as no work comparable to Moore's and Hackworth's Digests thus far has been published in any other country. It is highly interesting to learn from the foreword of the present book, that the French Foreign Office has entrusted Kiss with the task of creating a French counterpart of these Digests. Kiss's present excellent book is in itself proof enough that he will succeed also in this difficult and delicate task. When this work is completed, comparative research in the field of the practical application of international law will be possible. It would be invaluable, if other states as well would follow this French example.

I. SEIDL-HOHENVELDERN

LANGROD, G. *Les problèmes fondamentaux de la fonction publique internationale*. Bruxelles: Les Éditions de la Librairie Encyclopédique, 1953. Pp. 107.

Professor Langrod displays again his human understanding of the administrative problems in this survey of the functions and present operations of the International Civil Service in the United Nations, displaying the basic elements underlying the appearance of such an organization and the fundamental principles which should govern its birth and its growth. An administration is made of administrators. But the permanent consciousness of the author for the human

factor of the question in a field which requires from him the most technical approach (throughout the work the author keeps in touch with the realities of the International Administration, past and present, by the careful investigation of numerous official reports and documents of various sources in various languages) leads often to a complexity close to confusion. From this human standpoint, it seems sometimes that we are contemplating the squaring of the circle, but that is more dependent upon the nature of this highly technical problem, still imperfectly solved in practical situations, than upon the writer himself, since he is obliged to start his exposition looking upon a presently moving and confused organization. The tone is more one of a working report than of an informative study.

After a doctrinal introduction, Professor Langrod shows us the natural tendency toward unity of the status of the international civil servant and then explains the nature of the international spirit which should be required of every international civil servant. Defects of a too strict application of the system of geographical distribution in personnel recruiting are then balanced against the necessity to allow a minimum of freedom of choice to the executives relying upon personal qualifications of individual candidates; balance is necessary as well among the recruiting of international, local and semi-local staff. Problems of career, security of the position (most interesting for eventual candidates), hierarchy in the service, obligations and rights, privileges and immunities, of the international civil servant are lastly surveyed.

With his exposition the author gives us his conception of the notion of an international civil servant: it is the nature of the link which ties him to the international organization, and not the nature of his functions, which makes him an international civil servant. This link should be of a "public" nature, and not a contractual one, giving him a "*position statutaire.*" But, from an another standpoint, the author thinks that, more than the individual civil servant himself, it is the professional frame, the function, which should be stable (p. 68).

Further, it is of comparative interest that the United Nations Organization first adopted an American system of staff grading with a classification of the various types of employment into categories and grades along the lines followed by the "Bureau of the Budget" in Washington (a system of "job description") but abandoned it in 1950 and reverted to a system of general classification of the staff into four classes—according to the function of every civil servant—a system more in line with that of the European administrative tradition (pps. 72–74).

JEAN GILBERT

WEHBERG, H. *Krieg und Eroberung im Wandel des Völkerrechtes.* Frankfurt a.M./Berlin: Alfred Metzner Verlag, 1953. Pp. 134.

The present book is the German version of a series of lectures by Prof. Wehberg at the Hague Academy of International Law in 1951. The author first examines the medieval doctrine of *bellum justum*, which he considers to be unsatisfactory under modern conditions. He then proceeds to discuss the various measures to prevent war adopted in the interwar period, which, starting from certain provisions in the Covenant of the League of Nations, culminated in the Briand-Kellog Pact outlawing any war except war in self-defense or in fulfilment of League sanctions. The United Nation's Charter improved this system by outlawing not only the use of war but also any other use of force. On the other hand, it introduced the notion of collective self-defense—even in favor of nonmembers of the United Nations (cf. the NATO Pact). According to the author, present diplomatic practice has not yet fully adopted itself to these new rules out-

lawing war. If war is unlawful, the withholding of *de jure* recognition of annexations resulting from such wars is a duty under international law (contrast e.g. the recognition of the Italian annexation of Abyssinia). Thus, the Stimson Doctrine is a logical step towards the fulfilment of the aims of the Briand-Kellog Pact. As states are no longer free to proffer or refuse such recognition, its withholding cannot constitute a sanction to be imposed or lifted according to political expediency. The author draws a very sharp distinction between *de jure* and *de facto* recognition of annexations. The latter may be a necessity of practical life. Moreover a *de facto* recognition may enable the recognizing state to help the victims of the annexation. Such recognition therefore should not be incompatible with the spirit of the Stimson Doctrine, provided that it is not considered as constituting merely a first step towards *de jure* recognition. On the other hand, the annexing state cannot pretend, that a *de facto* recognition of its unlawful conquest proffered in this spirit does in any way constitute an international title to keep its spoils gained by illegal warfare. The author documents his views by very interesting parallels drawn from medieval history and by sample references to the debates on the subject at various League of Nations and United Nations meetings.

I. SEIDL-HOHENVELDERN

BISHOP, W. W. JR. *International Law. Cases and Materials*. New York: Prentice-Hall, Inc., 1953. Pp. xxvii, 735.

Every page of the present book shows that it is the work of a man with vast practical experience in teaching international law. Experience again and again has shown that references to leading cases, treaties, etc., contained in textbooks of international law will as a rule be neglected by students, who are loath to undertake the additional work involved in looking up these passages in collections or casebooks, all the more so as—at least in European universities—such books are not always easily accessible. On the other hand, it may well be doubted whether a young student would be able to gather a complete picture of international law from the study of cases alone, no matter how well chosen they are. In order to overcome these difficulties, the author has combined extensive quotations from classical English and American textbooks (chiefly from Oppenheim and Hackworth) with the reports of highly interesting—mostly American—cases and excerpts from bilateral and multilateral treaties. He thereby succeeds in giving a complete documentation of international law—chiefly as interpreted and applied by the United States. This last remark is in no way intended to be critical, as it is the main purpose of this book to be used for teaching international law to American students. Such students will, of course, be interested first of all in their own country's views on international law. The author very fairly does, however, give not only the United States point of view on some such controversial issues as, e.g., the Mexican nationalizations.

As far as the selection of cases is concerned, the author relies also to a large extent on United States decisions and on international awards interesting the United States. Although such classics as the *Wimbledon* and the *Lotus Case* are reported, this reviewer feels that, when it was possible to illustrate a point by an appropriate United States decision, more often than not such decision was given preference over similar European decisions, even where the latter were better known (e.g., p. 441). The result is very interesting to a European lawyer for the chance of comparison offered thereby. However, the size of the volume would not be unduly increased if footnotes would even more

frequently refer the American student to similar European cases, thus giving him opportunities for a comparison analogous to those of a reader acquainted with European cases.

This reviewer has no doubt that so excellent a book will soon appear in a second, enlarged edition. He therefore ventures to suggest some further improvements for this second edition. Thus, statements concerning general rules (e.g., concerning the binding force of treaties) appear slightly unrealistic if separated by pages of case reports supporting this rule from qualifying statements attached thereto (e.g., that the binding force of treaties may be challenged under the *clausula rebus sic stantibus*). In a textbook, such qualifying statements would appear on the same page as the main rule, thus setting the latter in its true proportion. It would seem advisable to establish some such connecting link also in books of the present type, at least by means of footnotes. It would also be useful if the author would somewhere give his answers to the questions wherewith he confronts the reader (e.g., p. 254).

These remarks are, however, not meant to detract from the high value of this outstanding work. Whoever studies it will have acquired a well-balanced picture of international law, without being obliged to refer to voluminous case reports and textbooks. This quality of the book was originally intended to facilitate its use by students in United States universities. However, as collections of Anglo-American reports are very rare on the continent of Europe, this same quality will render it particularly valuable to European scholars.

IGNAZ SEIDL-HOHENVELDERN

WRIGHT, Q. *Problems of Stability and Progress in International Relations*. Berkeley: University of California Press, 1954. Pp. xiv, 378.

This is a series of 21 essays written between 1946 and 1952 by the distinguished professor of international law at the University of Chicago. All the essays, with the exception of three, have been published previously, yet in so many different publications that only now do they become generally accessible. Among those published for the first time are two lectures which the author delivered on the occasion of the retirement of Hans Kelsen at the University of California, Berkeley, in May 1952.

The principal theme going through the whole volume is how to adapt human institutions and values to the rapidly changing conditions of the world. While the world has shrunk and the nations have become increasingly interdependent and vulnerable, people have preserved institutions and values which still reflect former conditions. The shrinkage and change of the world cannot be obviated, but institutions and values are subject to modification through information, education, and propaganda. The Kelsen lectures at the beginning of the volume give a comprehensive survey of the problem. All the other essays are elaborate studies of various aspects of the subject. They deal particularly with international organization and international law in meeting the challenge of changing conditions and with the role of science and education in developing universal values and a spirit of moderation. One finds most remarkable ideas on what the various sciences, especially political science, law, and psychology can contribute to that end.

Professor Wright eloquently describes the task and importance of the discipline of international relations and advocates the development of a "quantitative science of international relations." Surveys and measurements of government attitudes, of public opinion, power, etc. cannot, of course, attain the precision of the natural sciences, but even a slight degree of accuracy would be superior to that by which statesmen now

regulate their policy of armament building, alliance, commercial control, and international propaganda. Reliable information attained by such means might facilitate the international regulation of matters which cause at present international tensions. It might create an atmosphere of confidence in which universal ethical standards would develop and law would be observed. It will be necessary, however, that practical political activity and scientific thought get into closer relationship.

Professor Wright's book excels in the unusual variety of points of view from which a central problem is observed. It is at the same time illuminating and stimulating and deserves widest attention.

DIETRICH SCHINDLER

BRADY, A. *Democracy in the Dominions: A Comparative Study in Institutions.* 2nd. ed. Toronto: University of Toronto Press, 1952. Pp. viii, 604.

In this second edition, Professor Brady has brought up to date his comparative study of government in Canada, Australia, New Zealand, and South Africa, and has greatly enlarged the Comparisons and Conclusions contained in Part Five. Nowhere else can the reader find so ripe or so comprehensive a discussion of the subject, nor indeed so much information in a co-ordinated form. To an English reader it is very interesting to see a Canadian's thoughts on the other Dominions, for hitherto the Dominions have tended to find their main channel of communication in the Mother Country; and an Englishman's comparisons inevitably introduce an English element which is perhaps slightly alien to the subject and apt to distort the picture. Thus I wonder if Professor Brady, with his experience of Racial Tensions in Canada, does not see South African difficulties in clearer perspective than an Englishman, though I still wonder whether his attitude is not too optimistic. But I am rather surprised not to find a fuller description of the peculiar party habits of the French Canadians, who support one party at Ottawa and its opponents in Quebec; and there is only a stray reference to Newfoundland, which became a Province after the appearance of the last edition. All in all the book contains a remarkable testimony to the virtues of English Parliamentary Democracy and to the smallness of the changes which are needed for its successful transplantation overseas.

F. H. LAWSON

SHEPHERD, H. *Contracts and Contract Remedies: Cases and Materials.* 3rd. ed. Brooklyn: The Foundation Press, Inc. 1952. Pp. xxiv, 1355.

PLANT, M. L. *Cases on the Law of Torts.* Indianapolis: The Bobbs-Merrill Company, Inc. 1953. Pp. xxviii, 695.

These new editions, for Mr. Plant's book is based on a collection by Professor Leidy, prompt in an English reviewer the usual complaint that the authors would help us more if they stated their own views instead of merely collecting and editing cases. But Mr. Shepherd's collection at least is not subject to the common accusation that it is hard to use outside his own class; for he gives enough cases and in sufficient fullness to make it available even in an English law school, that is to say, as an illustrative supplement to the standard text books. Mr. Plant's collection seems to me rather more selective, perhaps unduly so, both as to the cases themselves and to the contents of the opinions in them. At any rate I doubt whether an English student could safely use it as a guide to prevailing American doctrine. This seems to me particularly true of both Strict Liability and Fraud but probably this only means that he would have to make more extensive use of American textbooks.

F. H. LAWSON

PRICE, M. O.—BITNER, H. *Effective Legal Research: A Practical Manual*

of Law Books and Their Use. New York: Prentice-Hall, Inc. 1953. Pp. xii, 633.

This is a detailed and technical account of the sources of American Law, covering not merely the most obvious sources, such as statutes, Law Reports, and treatises, but also legal histories, dictionaries, citators, and loose leaf sources. There are also standard citation forms and complete lists of reports, legal periodicals, and abbreviations. An English reviewer can only say that if the American and Canadian materials are as excellently dealt with as the English materials no one should have any difficulty in finding them with this guide to help him.

F. H. LAWSON

HUSBAND, W. H.—DOCKERAY, J. C. *Modern Corporation Finance.* (3rd. ed.) Chicago: Richard D. Irwin, Inc., 1952. Pp. xiv, 747

YORSTON, R. K.—FORTESCUE, E. E. *Proprietary and Private Companies in Australia.* (2nd ed.) Sydney: The Law Book Co. of Australia Pty. Ltd., 1952. Pp. xi, 264

Modern Corporation Finance is a text which ranges over nearly every conceivable aspect of corporation finance and its salient practices arising out of modern conditions. Upon an economic foundation—finance and the economic system—the authors have built a structure, comparing firstly the forms of business organization, and proceeding therefrom to discuss briefly the history and nature of American corporate enterprise. After a discussion of the steps in incorporation and the corporate charter, the subject of stocks and bonds is treated, followed by an analysis of promotion, which is deemed to give rise to the most important of all corporate problems, formulation of the financial plan. Analyses of capitalization and management precede recognition of the fact that the corporation is almost wholly dependent upon the investment by people of their savings, either directly or indirectly, in industry, and upon this fact is based a consideration of the various sources of capital, such as commercial and savings banks, life insurance companies, investment trusts and bankers, individuals, and government. Stock rights and warrants, securities distribution, and regulation of the sale of new offerings, as, for example, under the Securities and Exchange Act, are examined, as is corporate income, executives and their compensation, dividends and dividend policies, and reserves and working capital. The concepts and practices of expansion, combination and merger, and the holding company are reflected upon, as is the role of business failures in the economy, and causes and preventative measures therefor. This point of departure lends itself to a consideration of the methods and practices of reorganization under the Bankruptcy Act, and there is documentation in the form of summaries of such cases as those involving the Atlas Pipe Line Corporation, the Central States Electric Corporation, and the McKesson and Robbins Company. Railroad reorganization under the seventy-seventh section of the Bankruptcy Act gets full-chapter treatment. Taxation and Public Policy are the subjects of the closing chapter. A series of thought-provoking questions appears at the end of each of the thirty-six chapters of the book, as does a list of references concerned with the subject matter of each chapter. There are many footnotes and a subject index.

Unlike the above textbook, *Proprietary and Private Companies in Australia* is a manual treating the advantages, formation, statutory duties, and general practice of companies in Australia, including a concise explanation of the methods of converting an existing business and an existing company into a private or proprietary company. With the proprietary company, for example, the risk of bankruptcy is avoided,

and increased facility for borrowing money is permitted. The procedure necessary for the formation of such companies is outlined, and the statutory obligations connected with management are set forth. There are twenty-six chapters in this book, including one on taxation, consisting of a replaceable pocket part which can be brought up to date. Several chapters deal specifically with such matters as the memorandum of association; the articles of association; invitation by the proprietary company to apply for its shares; application and allotment of shares and the different classes thereof; transfers, transmission, forfeiture, and surrender; and call of shares. Other subjects to which attention is directed are: directors and their methods of contracting; annual return; borrowing by the proprietary company; meetings, minutes, and resolutions; accounts, auditors, and balance sheets; and dividends. The appendix contains a table of fees payable on the registration of a proprietary company and a statement of the implied powers of such company in South and Western Australia, as well as a compilation of the statutory provisions regarding proprietary companies in New South Wales, Western Australia, South Australia, Victoria, Tasmania, and Queensland.

Modern Corporation Finance is a comprehensive, well-organized, and articulate work, designed, it would appear, to fulfill the needs of a college or university student majoring in Economics or Business Administration. There is much to commend it to the lawyer or scholar as well, but its primarily reportorial style tends to establish it as a fact source, rather than a provocative volume stirring readers. *Proprietary and Private Companies in Australia* is, by an even greater token, a manual dealing with certain phases of commercial law, as seen in practice. It contains a considerable amount of statutory material and thus is most appropriately delineated a "how-to" book in contrast to the less specific "why" book. These are both solid bits of scholarship, intended to meet certain specific needs. However, they are not treatises that will add fuel to the fires of creative jurisprudence.

HILLIARD A. GARDINER

DEL VECCHIO, G. *Die Gerechtigkeit.* 2nd German edition translated by F. Darmstaedter. Basel: Verlag für Recht und Gesellschaft A.G., 1950. Pp. xii, 224.

DEL VECCHIO, G. *Lehrbuch der Rechtsphilosophie.* 2nd German edition translated by F. Darmstaedter. Basel: Verlag für Recht und Gesellschaft A.G., 1951, Pp. xv, 640.

These new German editions of books first published in Italian in 1922 (*La Giustizia*) and 1930 (*Lezioni di Filosofia del diritto*), and since edited in several other languages as well, testify to the continued interest in idealistic legal philosophy. The author, professor in Rome, is one of the now very few leaders in legal thought who had tried to reconcile dogmatic jurisprudence and speculative legal philosophy with the historical and positivistic schools of jurisprudence along the lines of Kantian critical philosophy. Darmstaedter has written a highly interesting introductory essay for the textbook, in which he compares Italian and German legal idealism and points out that Del Vecchio could work under a climate of learned opinion which, on the whole, was more propitious than that under which Stammler undertook to revive critical idealism in legal thought.

The book on *Justice* is equipped with the greatest known apparatus of quotations on the subject running from antiquity right down to recent literature. In this, the book is unique and indispensable. The author's own position is characterized by his rejection of the wide (theological, cosmological, moral) definitions and adoption of the narrow "juridical"

definition of justice, based upon the idea of intersubjective co-ordination. It is characterized also by the distinction between logical and deontological definition or, in other words, the formal concept and the absolute idea of justice. The latter consists in the unlimited recognition of the personality (autonomy) of everyone, whereas the former endorses many positive laws short of that ideal.

The *Textbook* includes interesting remarks on comparative method (63–65), and its *historical* part is a rare example of comparative jurisprudence. The survey of contemporary legal thought throughout the civilized world, extending also to the legal literature of small peoples, is comprehensive but probably not selective enough and ends with bibliographies. The *systematic* part deals, in three chapters, with the concept of law (336–538), with its origins and historical development (539–570), and with its rational foundation (571–627). Del Vecchio defines law as the "ordering of the acts occurring within a plurality of subjects, in conformity with an ethical principle which requires their development and precludes their hindrance" (371). Once more, we encounter the dualism of concept and idea when, in the third chapter, the ethical principle mentioned in the above definition is formulated as the inborn right to privacy ("you shall not act in an arbitrary way which amounts to coercing others; you shall not endeavor to subject another who by nature can be subject to himself alone" (608). The personality thus protected is, to be sure, not the empirical individual but the "eternal value of man" for which sacrifice of individual life may be necessary.

BARNA HORVATH

THE EDITORS OF LA PRENSA. *Defense of Freedom.* New York: The John Day Company, 1952. Pp. 315.

"The same moral laws that govern man, govern the institutions he creates." This volume deals with the destruction of one of these institutions, the freedom of the press, as exemplified by the fight between the Argentine government and the distinguished independent daily, La Prensa. To those who are acquainted with totalitarianism the story is only too familiar, and so are the methods and the outcome. Basic weakness, to which even objectivity means a menace, can tolerate no opposition. This is the reason why the first aim of a totalitarian regime is to curb every expression of objectivity, and this means the monopolisation of the press. The move began in Argentina in 1942, when the newspaper editors of Buenos Aires were notified by the chief of police to abstain "from making any controversial comment concerning the international situation, or publishing any views that might disturb internal political tranquility." After the coup d'état in 1943, measures became more explicit. But even a totalitarian government has to observe the forms of legality. Therefore, the means of pressure endeavored to remain within the limits of the law, discarding, of course, the basic provisions of 1853 that declare inviolability of the freedom of expression. The first open measure for intimidation occurred in 1944, when the publication of La Prensa was suspended for a week on account of an editorial that criticized the new policy of cutting down expenses in municipal hospitals. This was followed in 1946 by an action filed on the grounds of defrauding internal revenue by printing advertisements on duty free newsprint, a facility granted to all newspapers by laws of 1915 and 1917, and claimed the amount of 32,038,391,20 pesos that was allegedly withheld by the paper from 1939 to 1948. This was the sum on the basis of which later expropriation proceedings were started. Incidentally, the Attorney General, in a final opinion rendered in 1948, declared the illegality of this claim. Two criminal actions followed in due

course; one for disrespect shown to the Chief Executive, the other for inciting collective disobedience to laws and regulations in an editorial that declared the unconstitutionality of the Constituent Assembly's resolution, which extended the terms of office of congressmen. When neither of these actions, nor the display of brute mob violence against the paper (setting fire on the premises, armed attack on workmen that ended with the murder of an employee) showed any success, and the unanimous support of the public was manifest from the increasing circulation rates (1943: 303,357; 1945: 384,000; 1950: 480,000 copies daily), the final attack came in the form of an action taken by the Secretary General of the Union of News Vendors that, under the transparent disguise of a labor dispute, in which all the compromise counteroffers of the paper were simply discarded, ended with a bill passed by Congress, introduced by a congressional bicameral committee composed of members of the majority party, that voted the expropriation of the paper for 18.5 million pesos (the plant was worth more than 200 million pesos). There was no mention in the bill of the original labor dispute; the charges revolved around the unoriginal accusations of economic exploitation, conspiracy with foreign powers, dissemination of news against the interests of the nation, etc. The obvious feature of the campaign is its pseudo-legal nature: congressional investigating committees which acted first as investigators and later as judges in the same action, and the total discarding of judicial redress. Another feature must be stressed that gives hope to those who still believe in the morality of laws that govern man-made institutions, the unwavering and courageous attitude of the opposition party that dared to oppose in the name of legality an action the outcome of which must have been known at the outset. V. B.

KORNITZER, M. *Child Adoption in the Modern World.* New York: Philosophical Library, Pp. 403.

The author of this work, originally published in England, is press officer for a group of private adoption agencies, and an experienced voluntary worker for agencies serving deprived children in England. She presents a good comprehensive picture of the development of adoption in England and elsewhere in Great Britain since 1926, when the first enabling law was passed.

Written in a highly readable style, the book displays the typical British talent for facing up to disagreeable facts with cheerful common sense without minimizing their awful implications. Treating adoption in context (as a seasoned social worker should) as one of several techniques for serving deprived children, she makes clear the great size and spread of the terrible army of unwanted children with whom the earth is peopling itself. Driving force behind the rapid modern development of adoption, she suggests, is society's guilty conscience in a world child-hungry partly through remorse, partly from a sense that society is very ill and that the only potential improvement lies in the development of high grade children. The implications of this analysis are, to this reviewer, more immediately terrifying than the hydrogen bomb.

The book does not deal primarily with the legal techniques and doctrines as such, though it may arouse lawyers, if they will read it, to a seriously neglected area of the law. In touching upon American adoption literature, the author—not a lawyer—puts a finger on a major difficulty: in dealing with consents, we have confused an attitude towards a future act with the act itself. This is not so in England. In that country, an interesting technique for adoption of illegitimate children by their natural mothers appears to be

growing. It seems to offer interesting possibilities both legally and socially.

MAXINE VIRTUE

Child, Youth and Family Welfare. United Nations Legislative and Administrative Series. No. 3. Vol. II, 1950. (Columbia University Press, distributor). Loose leaf. Unnumbered pages.

This is a paper folder shaped like a book, containing a sheaf of legislative and administrative material of recent interest in the field described by the title. A supplementary list of legislative and administrative measures is included. A few annotations are included by way of footnotes to clarify background legislation, diction, and the like. Otherwise, no attempt is made to interpret the material.

A fascinating collection, of great potential usefulness to legal and social professionals working in this area. The format, however, greatly decreases the usefulness of the portfolio, in this opinion. The leaves are secured only by a twine fastened to a paper spoolhead on the back of the folder, and wound around folder and contents several times. But if the material is worth publishing at all, it ought to be presented in a more durable and cohesive garment.

MAXINE VIRTUE

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Mention in this list does not preclude a later review

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Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

CONFERENCES

THE EIGHTH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION—The Eighth Conference of the Inter-American Bar Association was held at São Paulo, Brazil, from March 15 to 22, 1954. Host association was the Instituto dos Advogados de São Paulo, of which Dr. José Barbosa de Almeida is the President. The sessions were held in the modern building of the Law School of São Paulo University. The Governor of the State, the Minister of Justice of Brazil, and Dr. Barbosa de Almeida welcomed the visitors. The responses were made by Robert G. Storey, chairman of the delegates from the United States, and by Dr. Eduardo J. Couture from Uruguay, past president of the Association.

The 76 topics on the program were considered in 14 committees or sections, and ninety resolutions were adopted which will be published in due course. There were approximately 40 delegates from the United States. Carolyn R. Just of Washington, D. C., served as reporter general of the Conference. At the closing session, addresses were delivered by Dr. Eduardo Salazar, Mr. George M. Morris, and Dr. Natalio Chediak. A special session was held by the Court of Appeals of the State of São Paulo at which Judge Joseph A. Moynihan of Detroit, past president of the Association, delivered an address dealing with the administration of law in the United States.

The next Conference will be held in Dallas, Texas, on April 15 to 21, 1956. New Officers elected include Mr. Robert G. Storey, of Dallas, as President; Dr. José Barbosa de Almeida as Honorary President; Dr. Eduardo Salazar Gomez of Quito, Ecuador, as chairman of the Executive Committee. Officers re-elected were William Roy Vallance as secretary general; Lic. Miguel S. Macedo as Treasurer, and Mr. David B. Karrick as Assistant Treasurer. Among the new Assistant Secretaries General is Whitney R. Harris of Dallas, Texas.

AMERICAN BRANCH, INTERNATIONAL LAW ASSOCIATION—The Annual Meeting of the American Branch of the International Law Association, held in New York City on May 15, 1954, had on its program (1) discussion of a report of the Private International Law Committee, headed by Elliott E. Cheatham, on Participation by the United States in International Conferences dealing with Private International Matters, (2) Revision of the Charter of the United Nations. It was decided to appoint a committee on Review of the Charter. The Executive Committee was instructed to institute steps to have an appropriate organization make a study of the appropriate methods, under the American federal structure, of American participation in conferences and conventions on the law governing private international matters. Pending the further development of methods of participation in these conferences, it was decided to request the Department of State to send observers to the conferences to which the United States may be invited and in which it would not otherwise be represented. The meeting approved branch committee reports prepared for the Edinburgh Conference of the Association. The speaker at the annual dinner was the president of the Canadian Branch of the Association, Professor Maxwell Cohen, of McGill University, who spoke on "The Inter-

national Secretariat and the Eighth General Assembly of the United Nations." Clyde Eagleton was re-elected president, Elliott E. Cheatham and Pieter J. Kooiman were re-elected vice-presidents. Cecil J. Olmstead, New York University School of Law, was elected secretary.

CELEBRATION OF THE 150TH ANNIVERSARY OF THE CODE CIVIL—Under the sponsorship of various American organizations and institutes interested in foreign and comparative law, a meeting was held on May 14, 1954 at the Association of the Bar of the City of New York to commemorate the 150th anniversary of the French Civil Code. Organized by the Permanent Representative in the United States of the French Universities, Cultural Counselor of the French Embassy, Pierre Donzelot, and the dean of the Faculty of Law and Political Science, French University of New York, Boris Mirkine-Guetzévitch, the meeting, presided over by Mr. Donzelot, was addressed by Messrs. Jacques de Thier, Consul General of Belgium in New York, Constantine A. Stavropoulos, Principal Director in Charge of the Legal Department of the United Nations, and B. Mirkine-Guetzévitch. Lectures were delivered by R. R. Palmer, Professor of History, Princeton University: "The Civil Code as a Historic Landmark;" Claude Lévy, Faculty of Law, French University of New York: "*Codification, expérience et droit subjectif*;" Alexis C. Coudert, Professor of Law, Columbia University: "The Influence of the Civil Code in the Western Hemisphere." The Library of the Association of the Bar of the City of New York had arranged an exhibition of codes, statutes, and writings on the Code, including official drafts and proclamations by hand and authority of Napoleon, lent by the Government of France.

A LECTURE ON THE FRENCH CONSEIL D'ETAT—Professor René Cassin, Vice-President of the *Conseil d'Etat*, President of the *Société de Législation Comparée*, lectured at Columbia University on April 8, 1954, on the French *Conseil d'Etat*. He gave the history of the Council of State, discussed in particular the participation of the Council in the drafting of the Code civil, currently celebrating its 150th anniversary, and gave an outline of the changes made in 1953 in the jurisdiction of the Council and of the lower administrative tribunals. Resident members of the *Société de Législation Comparée* and members of the American Foreign Law Association were among those who attended the lecture.

VARIA

INTERNATIONAL INSTITUTE OF POLITICAL PHILOSOPHY—There has been established, with headquarters at the Sorbonne in Paris, an International Institute of Political Philosophy for the purpose of bringing together scholars from the various fields related to political philosophy, including constitutional law, jurisprudence, sociology, and history. President of the Institute is Georges Davy, Executive Vice-President is B. Mirkine-Guetzévitch, Secretary General is R. Polin. Among the members of the Council are C. Friedrich, R. McKeon, and H. Kelsen, of the United States. The first topic to be investigated is "power," and in particular, "sovereignty." The Institute will publish its *Annales*.

COMPARATIVE LAW WORK IN VENEZUELA—The Law School of the Central University of Venezuela, Caracas, has added to its Private Law Seminar a Section for Comparative Law. Dr. Roberto Goldschmidt, formerly of the Comparative Law Institute of Córdoba, Argentina, has been made director of the Section.

IN MEMORIAM

PROFESSOR HAROLD COOKE GUTTERIDGE, Q.C.—Professor H. C. Gutteridge, who died on the 30th December last at the age of 77, was the first Professor of Comparative Law in the University of Cambridge, and the first full-time Professor of Comparative Law in England. He was a member of the Institute of International Law. He took First Class Honours in the University of Cambridge in History (1898) and Law (1899), was called to the Bar by the Middle Temple in 1900 (ultimately becoming a Bencher of that Inn), and practised in the Common Law Courts, mainly in commercial cases.

On the outbreak of the first World War he first served as a sergeant-major with the Inns of Court Officers Training Corps, was later commissioned in the Army Ordnance Corps, and served in Salonika, being mentioned in dispatches and retiring with the rank of Captain. After the war he resumed practice at the bar for a brief period until, in 1919, he was elected Sir Ernest Cassel Professor of Industrial and Commercial Law in the University of London. This post he held for eleven years during which he played a very considerable part in building up the Faculty of Law and in converting it from a part-time basis to a mainly full-time body of teachers. At the same time he maintained a consultant practice in the Temple.

He was an excellent linguist and was very familiar with French, German, and Italian. It is therefore not surprising that, possessing this equipment and the large knowledge of commercial law that he had acquired both in practice and as a teacher, he found his interests becoming more and more directed towards Conflict of Laws and Comparative Law. He was a member of the Geneva Conference on the Unification of the Law of Bills of Exchange and Cheques, and was much in demand by the United Kingdom Government for work of that kind. In 1930, he was invited by the University of Cambridge to accept a Readership in Comparative Law, which was specially created for him, and fortunately his financial position enabled him to accept this invitation and thus concentrate upon his chosen field. There followed a fellowship at Trinity Hall, which was a source of infinite pride and pleasure to him. In 1934 the Readership was converted into a Chair, which he held until he reached the age-limit in 1941. Throughout his period at Cambridge, he was lecturing on Conflict of Laws and supervising research students both in that subject and in Comparative Law. But his main interest lay in research and writing in the latter subject.

He was a member of the Royal Commission on the Manufacture of and Traffic in Arms, and of the Lord Chancellor's Law Revision Committee, Enforcement of Foreign Judgments Committee, and Legal Education Committee, and from 1939 onwards a member of the Shipping Claims Tribunal. He was doctor of laws in the Universities of London and Cambridge and received honorary doctorates from the Universities of Lyons, Grenoble, Paris, and Salonika.

Apart from numerous articles in periodicals, his principal legal publications are the thirteenth edition of *Smith's Mercantile Law* (a classic work) in 1931, *Bankers' Commercial Credits* published in 1932, and *Comparative Law* published in 1946, followed by a second edition in 1949. *Bankers' Commercial Credits* was, I believe, the first book on this subject published in the United Kingdom. The subject was one of growing importance and little was known about it outside the circle of merchants and bankers and their legal advisers. His experience as a practitioner in commercial law, coupled with his grasp of general legal principles, enabled him to produce a valuable pioneering book.

Before Gutteridge applied himself to Comparative Law, it had occupied the attention of Maine, Vinogradoff, Pollock,

Amos, and others in Great Britain, and the Society of Comparative Legislation had for nearly half a century made the somewhat limited circle of readers of its *Journal* (which Gutteridge edited for some years) familiar with many of the important legal rules and institutions of foreign countries. In particular, the annual survey of legislation within the British Empire and Commonwealth had been of great value in pooling legal knowledge within that area. Gutteridge's book, *Comparative Law*, was, however, the first systematic attempt in England to "state the case" for this subject: what it is, what is its province, what its value is, the process of comparison, of what use it is in connection with the Conflict of Laws and the Law of Nations, the comparative approach to case-law and to the interpretation of statutes; the problem of legal terminology; the place of Comparative Law in legal education; its importance in the movement for the unification of private law, and the progress of that movement. Throughout the book it is clear that the author's main urge is derived from the purposes of the comparative method and, in particular, from the need of promoting a common basis of understanding amongst lawyers who are practising or teaching in widely differing legal systems. It is for this reason that the book is primarily concerned with the fundamental differences between the common law, using that term in its widest sense, and the civil law, using that term to denote the modern law of those countries whose legal system derives its inspiration from Roman Law. He has certainly succeeded in enabling his fellow-countrymen to reach a clearer understanding of the content of the legal systems of those countries, and, at any rate in Western Europe, he has been the means of producing a much wider appreciation of the fundamental legal ideas which prevail in the English-speaking countries throughout the world. A French translation of his *Comparative Law* has been published, and a Spanish translation is now in course of preparation.

Mention should also be made of the course of lectures delivered by him as Professor in the Hague Academy of International Law in 1933 entitled *Conflit des lois de compétence judiciaire dans les actions personnelles*, published in volume 44 of the Academy's *Recueil des Cours*, and of his David Murray Lecture in the University of Glasgow, entitled "The Codification of Private International Law," published in 1951.

His successor at Cambridge, Professor C. J. Hamson, has compiled a list of more than fifty of Professor Gutteridge's contributions to periodicals and joint works, both British and foreign; this list will be published in the *International and Comparative Law Quarterly*, and a volume of selected articles is under consideration. Meanwhile, I shall mention a few of the topics dealt with in these articles: (a) treated comparatively, Privacy, Abuse of Rights, Unjustified Enrichment (with Professor René David), Interpretation of Statutes, Legal Terminology; (b) the general problem and technique of Unification, and, in particular, the Unification of the Rules of Conflict relating to Negotiable Instruments, the law of Sale, and the law of Bills of Exchange; (c) from the point of view of Conflict of Laws, Reciprocity in the Enforcement of Foreign Judgments, Maintenance Orders, Unjustifiable Enrichment, Jurisdiction in Matrimonial Causes; and (d) many topics of Commercial Law.

I am sure that Gutteridge's colleagues would agree with me in saying that an examination of his published work, however impressive, would give a very inadequate picture of what he did for teaching and research in law in London and Cambridge. He was a man of remarkably good judgment and possessed a charming personality which enabled him to exercise a wide influence. This was of particular importance in the case of a subject like Comparative Law which was new and had to establish its right to recognition amongst other fields of legal studies.

This is not the place in which to write

of him as a friend. I must confine myself to my experience of him as a colleague, a lawyer, and a scholar. He was the most *English* of all the men that I have known (I write as a Scotsman). His was no *perfervidum ingenium*. All that he did or wrote was controlled by his excellent judgment. He was profoundly sceptical of brilliant theories. He knew by instinct where logic had to give way to experience. He was incapable of even a literary feud, and, in matters where no moral principle was involved, he was always ready to meet the other side half way. He was quick in detecting pomposity and was immunized against the professorial ambition of founding a "school" or "system" and surrounding oneself with adoring pupils whose duty it is to give international currency to the reputation of the *maestro*. He placed Comparative Law "on the map" in British countries, both as a subject of study and as a practical instrument of legal progress. This achievement needed more than sound learning and good judgment; it could only have been done by a man who also enjoyed universal respect and confidence, and Gutteridge was the man who united in his person all these requirements.

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